No. 17-387	
Title:	**Upper Skagit Indian Tribe, Petitioner** **v.** **Sharline Lundgren, et vir**
Docketed:	September 13, 2017
Lower Ct:	Supreme Court of Washington
Case Numbers:	(91622-5)
Decision Date:	June 8, 2017
Rehearing Denied:	June 12, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 11 2017	Petition for a writ of certiorari filed. (Response due October 13, 2017)
Oct 13 2017	Brief of respondents Sharline Lundgren and Ray Lundgren in opposition filed.
Oct 27 2017	Reply of petitioner Upper Skagit Indian Tribe filed.
Nov 01 2017	DISTRIBUTED for Conference of 11/21/2017.
Nov 17 2017	Rescheduled.
Nov 27 2017	DISTRIBUTED for Conference of 12/1/2017.
Dec 04 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Petition GRANTED.
Jan 22 2018	Brief of petitioner Upper Skagit Indian Tribe filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2018	Joint appendix filed. (Statement of costs filed.) **Main Document** **Main Document**
Jan 24 2018	SET FOR ARGUMENT ON Wednesday, March 21, 2018

Jan 29 2018	Brief amici curiae of Cayuga Nation, Seneca Nation of Indians, Saint Regis Mohawk Tribe, Cherokee Nation, Pueblo of Pojoaque filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amici curiae of Fond du Lac Band of Lake Superior Chippewa, Puyallup Tribe of Indians, and Skokomish Indian Tribe filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Jan 29 2018	Brief amici curiae of States of Illinois, Indiana, New Mexico, and Texas filed in Support of Neither Party **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 29 2018	Brief amici curiae of National Congress of American Indians, et al. filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Feb 07 2018	CIRCULATED
Feb 21 2018	Record requested from the Supreme Court of Washington.
Feb 21 2018	Brief of respondents Sharline Lundgren and Ray Lundgren filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 28 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Feb 28 2018	Brief amicus curiae of Public Service Company of New Mexico filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 28 2018	Brief amici curiae of Village of Union Springs, Town of Springport, Cayuga County filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 28 2018	Brief amicus curiae of Seneca County, New York filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 12 2018	Reply of petitioner Upper Skagit Indian Tribe filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 16 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 21 2018	Argued. For petitioner: David S. Hawkins, Sedro-Woolley, Wash.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Eric D. Miller, Seattle, Wash.

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RECORD AND BRIEFS

No. 17-387

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioners,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the Upper Skagit Indian Tribe, a federally recognized Indian tribe. Petitioner was the defendant and appellant below. Respondents are Sharline and Ray Lundgren, who were the plaintiffs and respondents below.

There are no parent or publicly-held corporations involved in the proceeding.

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OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court that is the subject of this petition is reported at *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 389 P.3d 569 (2017), and reproduced at Appendix A. The order of the Washington Supreme Court denying the motion for reconsideration is unreported but reproduced at Appendix C.

The opinion of the Washington Superior Court denying the Upper Skagit Indian Tribe's motion to dismiss is unreported but reproduced at Appendix B.

BASIS FOR JURISDICTION

The opinion of the Washington Supreme Court that is the subject of this petition was entered on February 16, 2017, and amended on June 8, 2017, before denial of the Upper Skagit Indian Tribe's motion for reconsideration on June 12, 2017.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

INTRODUCTION

Despite settled law about suits against federally recognized Indian tribes, the Washington State Supreme Court concluded that an action against real property of the Upper Skagit Indian Tribe (the "Tribe") did not require an analysis of tribal sovereign immunity. In doing so, the Washington Supreme Court joined a national debate, dividing all ranks of

state and federal courts, about the proper interpretation of this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). "Long before the formation of the United States, [t]ribes 'were self-governing sovereign political communities.'" *Id.* at 2040 (citation omitted). A core aspect of the tribes' sovereignty is common-law immunity from suit. *Id.* at 2030.

Unequivocal precedent of this Court, reaffirmed most recently in *Bay Mills*, recognizes that a tribe may lose sovereign immunity in only two ways: (1) if Congress abrogates sovereign immunity; or (2) if the tribe waives sovereign immunity. *Id.* at 2030–31 ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." (citations omitted)). Any congressional decision to abrogate immunity must be clear — "Congress must 'unequivocally' express that purpose." *Id.* at 2031–32 ("That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (citations omitted)).

In the absence of waiver and abrogation, sovereign immunity is an absolute jurisdictional bar. *See FDIC*

v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015 (9th Cir. 2007) ("Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign.").

Courts below are split on the issue presented by this case: whether *in rem* actions against tribal property negate the jurisdictional bar of sovereign immunity when there has been neither waiver nor abrogation. The Second Circuit and the New Mexico Supreme Court correctly held that the answer is no: there is no *in rem* exception to tribal sovereign immunity. But in the 5-4 decision below, the Washington Supreme Court joined the North Dakota Supreme Court in reaching the opposite conclusion.

The Washington Supreme Court did not attempt to justify its holding under the doctrine of sovereign immunity, nor could it have done so because neither exception applied. It is undisputed that the Tribe did not waive immunity. *Lundgren*, 187 Wash. 2d at 881 n.4 (Stephens, J., dissenting). There is also no basis for an abrogation argument: the Washington Supreme Court did not examine the issue and, thus, did not hold that Congress had unequivocally abrogated tribal sovereign immunity from lawsuits brought *in rem*, as here, to quiet title held by tribes in disputed property. *See generally Lundgren*, 187 Wash. 2d at 857; CP at 134, 155–57.

Instead, the Washington Supreme Court held that personal jurisdiction over the Tribe was unnecessary

to the trial court's power to act because the action was brought *in rem*. *Lundgren*, 187 Wash. 2d at 866–67. On this basis, the Washington Supreme Court held that the trial court did not need to address the issue of sovereign immunity. *Id.* The Washington Supreme Court incorrectly analyzed this Court's decision in *County of Yakima* in claiming, "[t]he United States Supreme Court has recognized this principle." *Id.* (citing 502 U.S. at 255).

The decision below conflicts with not only the limited holding of *County of Yakima* but also betrays the carefully circumscribed exceptions to sovereign immunity reaffirmed in *Bay Mills*. As evidenced by the split in authority, the conflict will not be resolved until this Court issues a definitive ruling. And until such a ruling is made, there will be uncertainty about the scope of tribal sovereign immunity invoked in *in rem* proceedings throughout the country.

This split in authority presents a jurisprudential issue of great significance to all tribes as well as litigants in a wide variety of *in rem* cases that are likely to increase exponentially as tribes engage in business ventures involving real property. The divergent views of lower courts on this issue creates the certainty of inconsistent results for litigants depending on the federal circuit or state in which the tribal property happens to be located.

This case is an ideal vehicle for resolving this important federal question. There are no factual issues in dispute. And resolving the split rests

primarily on clarifying this Court's holding in *County of Yakima*.

This petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

1. In 2013, the Tribe bought property in Skagit County, Washington and received a statutory warranty deed. In 2015, the adjacent property owners, Sharline and Ray Lundgren, filed a quiet title action against the Tribe, alleging they had acquired title to a strip of land along the common boundary through adverse possession before the Tribe purchased the land. *Lundgren*, 187 Wash. 2d at 861–63.

2. The Tribe entered a special appearance, noting that the Tribe "does not waive its inherent sovereign immunity." Clerk's Papers (CP) at 256. The Tribe then filed a motion to dismiss asserting sovereign immunity and, alternatively, failure to join a necessary and indispensable party under Rule 19. CP at 229–44. The trial court denied the Tribe's motion to dismiss and granted summary judgment in favor of the plaintiffs. CP at 155–60.

3. On the Tribe's petition for direct review, the Washington Supreme Court accepted review. In a 5-4 decision, the Washington Supreme Court affirmed, holding that the Tribe's sovereign immunity did not bar suit because the nature of the quiet title action enabled the trial court to exercise *in rem* jurisdiction

over the Tribe's property rather than *in personam* jurisdiction over the Tribe. *Lundgren*, 187 Wash. 2d at 864–68. The Washington Supreme court concluded, that when an action proceeds under the trial court's *in rem* jurisdiction, the trial court "[does] not need to address sovereign immunity" because "the doctrine of sovereign immunity [does] not apply." *Id.* at 867–68. The Washington Supreme Court also affirmed the trial court's holding that the Tribe was not a necessary party within the meaning of Rule 19, and, therefore, joinder of the Tribe was not compulsory. *Id.* at 868–73.

4. The four dissenting justices did not reach the issue of sovereign immunity and rested their conclusions on Rule 19 grounds. *Id.* at 874–75 (Stephens, J., dissenting). But the dissent also recognized that "recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity." *Id.* at 876 n.1. In particular, the dissent noted that, whether the majority's holding "rests on a misreading of *County of Yakima*" "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Id.*

REASONS WHY CERTIORARI IS WARRANTED

A. The decision below conflicts with the weight of authority in the split among lower courts interpreting the reach of *County of Yakima*.

The Washington Supreme Court's recognition of an *in rem* exception to tribal sovereign immunity, joined by the North Dakota Supreme Court, directly conflicts with the Second Circuit and New Mexico Supreme Court's decisions recognizing that sovereign immunity barred suit despite the *in rem* nature of the underlying proceeding. *Compare Lundgren*, 187 Wash. 2d at 865–66 (citing to *County of Yakima* for proposition that "a court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity"), *and Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W. 2d 685, 691 (N.D. 2002) (holding that *in rem* condemnation action may proceed and citing *County of Yakima* for the proposition that "[c]ourts have recognized distinctions in application of the doctrine of tribal sovereign immunity based upon the in rem or in personam nature of the proceedings"), *with Cayuga Indian Nation of New York v. Seneca Cty., N.Y.*, 890 F. Supp. 2d 240, 247–48 (W.D.N.Y. 2012) (rejecting argument that *County of Yakima* "stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* [foreclosure] proceedings"), *aff'd*, 761 F.3d 218, 221 (2d Cir. 2014) (declining to read an "implied abrogation" into *County of Yakima* or "draw [] novel distinctions—such as a distinction between *in rem* and *in personam* proceedings" as applied to the doctrine of tribal sovereign immunity from suit), *and Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (rejecting characterization of *County of Yakima* as authorizing "the tribe's amenability to suit in court based on a

concept of an *in rem* exception to immunity" because "in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims").

These cases diverge on an important question of federal law and cannot be distinguished on the facts. Both the New Mexico Supreme Court and dissent in the Washington Supreme Court recognized this fundamental disagreement over the proper interpretation of *County of Yakima* in light of *Bay Mills*. *See Hamaatsa*, 388 P.3d at 986 (acknowledging the contrary decisions by the North Dakota and Washington Supreme Courts but choosing "to follow the Second Circuit, and thereby refus[ing] to recognize an exception to tribal sovereign immunity for *in rem* proceedings"); *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting) ("It is worth noting, however, that recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity. Because I would decide this case under CR 19, I do not reexamine our precedent in light of *Bay Mills*. Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima*, though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*.").

This split in authority over the proper interpretation of *County of Yakima* extends to all

ranks of federal and state courts and is by no means limited to the rulings of the Second Circuit and three state supreme courts. *Compare Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, No. CV1502463RGKMANX, 2015 WL 12552060, at *3 (C.D. Cal. July 2, 2015) ("Plaintiff has failed to provide any binding authority to show that Congress abrogated the Tribe's immunity to in rem actions . . . . Unlike the present action, *Yakima* concerned an action by the local government pursuant to an *express abrogation* of tribal power by an act of Congress."), *Pub. Serv. Co. of New Mexico v. Approximately 15.49 Acres of Land in McKinley Cty., New Mexico*, 167 F. Supp. 3d 1248, 1265 (D.N.M. 2016) (distinguishing *County of Yakima* on the basis that the disputed tribal land subject to the attempted condemnation was a part of an allotment rather than unrestricted land in fee as in *County of Yakima*), *Oneida Indian Nation of New York v. Madison Cty.*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as in rem, when it is, in actuality, a suit to take the tribe's property."), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d 408 (2d Cir. 2011), *and First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) ("We do not agree with [the] assertion that *Yakima*, and the other precedent upon which it relies, are authority that 'plainly demonstrate that tribal sovereign immunity does not bar the exercise of *in rem* jurisdiction over tribal property, even when a tribe loses some part of that property as a result.'"), *with Miccosukee Tribe of Indians of Florida v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees of Internal Imp. Tr. Fund*, 78 So. 3d 31, 34

(Fla. Dist. Ct. App. 2011) ("The eminent domain action here is not an action against the Tribe itself, but instead is an action against land held in fee by the Tribe. The Department of Environmental Protection does not need personal jurisdiction over the Tribe—it needs only in rem jurisdiction over the land.").

The Washington Supreme Court, in joining the North Dakota Supreme Court, has decided an important federal question that conflicts with the decisions of the Second Circuit and New Mexico Supreme Court. This controversy is also evident among the lower federal and state courts of other jurisdictions. This Court's intervention is necessary to clarify its holding in *County of Yakima* and resolve this split in authority.

B. The decision below is contrary to this Court's narrow holding in *County of Yakima* and the limited exceptions to tribal sovereign immunity recently reaffirmed by this Court in *Bay Mills*.

In rem jurisdiction is neither an exception to nor a means to circumvent the Tribe's right to assert sovereign immunity. The theory—that a trial court can acquire subject-matter jurisdiction in a quiet title action against the tribe because jurisdiction is based *in rem* over the tribe's property rather than *in personam* over the tribe—cannot be reconciled with *County of Yakima*.

In *County of Yakima*, the Yakima Indian Nation challenged whether the County of Yakima could

impose ad valorem taxes on "fee patented"[1] lands located within the Yakima Indian Reservation. 502 U.S. at 253. This Court carefully analyzed the plain language as well as history of the Indian General Allotment Act ("GAA") to determine whether it "contain[ed] the unmistakably clear expression of intent that is necessary to authorize state taxation of Indian lands." *Id.* at 251–252, 259.

Specifically, this Court examined the significance of the Burke Act proviso, an amendment enacted nearly two decades after the GAA, and confirmed that the proviso contained a clear and unmistakable congressional intent to authorize taxation of fee patented lands, which, necessarily, extended to *in rem* actions brought to enforce that power to tax. *Id.* at 259, 264 ("[W]e agree with the Court of Appeals that by specifically mentioning immunity from land taxation 'as one of the restrictions that would be removed upon conveyance in fee,' Congress in the Burke Act proviso 'manifest[ed] a clear intention to permit the state to tax' such Indian lands." (citation omitted)).

Nothing in *County of Yakima*, however, stands for the proposition that the *in rem* nature of the action was dispositive of the issue of sovereign immunity. Rather, only the finding of express abrogation in the

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[1] The "fee patent" refers to the "issuance of a deed, or title, to land formerly held [in trust] by the U.S. government, to individual members of an Indian tribe." Gary A. Sokolow, *Native Americans and the Law: A Dictionary* 90 (2000).

GAA, through the enactment of the Burke Act proviso, controlled and defeated immunity. That holding, however, extended only to actions concerning property transferred under the GAA. *County of Yakima* did not purport to—nor could it—erase immunity in all *in rem* actions.

This Court's discussion of *in rem* jurisdiction arose only to explain why its earlier decision in *Moe v. Confederated Salish and Kootenai Tribes*[2] was consistent with its holding that the GAA expressly authorized suits to enforce state taxation of fee patented lands. *Id.* at 265 ("[B]ecause the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned . . . ."). But this discussion does not support an interpretation that tribal sovereign immunity turns on the *in rem* nature of the underlying proceeding.

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[2] In *Moe*, this Court rejected the State of Montana's claim that the GAA expressly authorized taxation of Indians residing or conducting business on reservation land, which Montana alleged gave rise to *in personam* jurisdiction over reservation Indians to enforce that power to tax. 425 U.S. 463, 478 (1976) ("By its terms [the GAA] does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for All jurisdictional purposes civil and criminal the Flathead Reservation has been substantially diminished in size.").

The exception to sovereign immunity recognized in *County of Yakima* was based not on the *in rem* nature of the action but on the express abrogation of immunity in the GAA. After all, if *in rem* jurisdiction were alone sufficient to circumvent sovereign immunity, this Court's careful discussion of the plain language and history of the GAA in *County of Yakima* would have been unnecessary and moot.

The fundamental principle underlying this distinction is that, absent waiver, abrogation must be unequivocal. In the case of fee patented lands, abrogation was an express element of the statute creating the program. *County of Yakima* relies on this express abrogation in the GAA, which is necessarily limited to fee patented lands as the sole subject of abrogation. Here, it is undisputed that the GAA has no application: the Tribe acquired the disputed land from a private owner through a statutory warranty deed, not from the federal government through the fee patenting system authorized under the GAA.

The theory that a tribe's sovereign immunity turns on whether the judicial proceedings are *in rem* or *in personam* conflicts with *County of Yakima*. And the *in rem* exception adopted by the Washington Supreme Court also conflicts with this Court's decision in *Bay Mills*, which reaffirmed as "settled law" the only two exceptions to the avowedly "broad principle" of sovereign immunity. 134 S. Ct. at 2030–31 ("[W]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver).").

Further, the distinction between *in rem* and *in personam* jurisdiction is pure fiction as it relates to suits against sovereigns. *Cf. The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an *in rem* exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity).

The Washington Supreme Court has decided an important federal question directly in conflict with this Court's decisions in *County of Yakima* and *Bay Mills*. If allowed to stand, the decision below will have far-reaching implications for the sovereign immunity rights of the 29 federally-recognized Indian tribes in Washington State.[3] *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.19 (1978) (recognizing that "many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of" "[t]he cost of civil litigation"). This Court's intervention is necessary to correct the Washington Supreme Court's misapplication of binding precedent.

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[3] *See* Washington Governor's Office of Indian Affairs, Washington State Tribal Directory at 2–4 (June 20, 2017), *available at* http://www.goia.wa.gov/Tribal-Directory/TribalDirectory.pdf.

C. The question presented is an important jurisdictional issue of federal law, and this case would be a good vehicle for resolving it.

The Washington Supreme Court's decision improperly abrogates tribal sovereign immunity, conflicts with this Court's precedent, and intensifies the emerging division among state supreme courts and federal circuit courts. The decision below is an ideal vehicle for resolving the important federal question of whether the exercise of *in rem* jurisdiction overcomes the absolute defense of sovereign immunity asserted by a federally recognized Indian tribe absent waiver by the tribe or unequivocal abrogation by Congress. The relevant facts are not in dispute, and resolution of the case primarily turns on clarifying this Court's holding in *County of Yakima*.

Because this case raises recurring issues involving *in rem* actions initiated against federally recognized Indian tribes, further delay before resolving the split in authority will have significant, negative implications for tribal sovereignty as well as profound jurisdictional consequences, including an unwarranted drain on judicial resources in cases where jurisdiction should be barred. This Court should accept review to resolve the split in authority, conform the Washington Supreme Court's decision to the unambiguous precedent of this Court, and restore the broad scope of tribal sovereign immunity.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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September 8, 2017

APPENDIX A

SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents.

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

Skagit County No. 15-2-00334-1

OPINION

Appeal from the Superior Court of the State of Washington for Skagit County. No. 15-2-00334 – Dave Needy and Susan Cook, *Judges.*

ARGUED JUNE 9, 2016
FILED FEBRUARY 16, 2017
AMENDED JUNE 8, 2017
RECONSIDERATION DENIED JUNE 12, 2017

Before: En Banc: JOHNSON (Opinion), OWENS, WIGGINS, GONZÁLEZ, YU, STEPHENS (Dissenting), McCloud, Fairhurst, and Madsen, *Supreme Court Justices.*

JOHNSON, J.

*861¶1 This case involves the relationship between in rem jurisdiction, Superior Court Civil Rule (CR) 19, and sovereign immunity. The issue is whether the Upper Skagit Indian Tribe's (Tribe) assertion of sovereign immunity requires dismissal of an in rem adverse possession action to quiet title to a disputed strip of land on the boundary of property purchased by the Tribe. The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. An inquiry under CR 19, as required by our cases, involves a merit-based determination that some interest will be adversely affected in the litigation. Where no interest is found to exist, especially in an in rem proceeding, nonjoinder presents no jurisdictional barriers. We find that the Tribe does not have an interest in the disputed property; therefore, the Tribe's sovereign immunity is no barrier here to this in rem proceeding. The trial court properly denied the Tribe's motion to **571 dismiss and granted summary judgment to the property owner. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sharline and Ray Lundgren and the Tribe own adjacent properties in Skagit County, Washington. A barbed wire fence runs along the southern portion of the Tribe's land. The fence spans the width of the Tribe's lot, with a gate approximately halfway along the fence line. The land between the fence and the southern boundary of the Tribe's *862 lot is the land at issue in this case. For ease of reference, we refer to this land as the "disputed property."

¶3 The Lundgrens bought the 10 acres of land immediately south of the disputed property in 1981. The property had been in their extended family since 1947, when Sharline Lundgren's grandmother first bought the property. The Lundgrens established that the fence on the disputed property has been in the same location since at least 1947, and that for as long as their property has been in the family, they have treated the fence as the boundary line. Since 1947, the Lundgren family exclusively has harvested timber, cleared brush, kept the fence clear of fallen trees, and treated the disputed property on the southern side of the fence as their own.

¶4 The Tribe's land had been previously owned by Annabell Brown for many decades. In 1984, she quitclaimed a 1/4 undivided interest in the property to her son David Brown. Upon her death, the rest of the property passed to her other children, Paul Brown, Vivian Jennings, and Barbara Carrell. In 2013 the Tribe bought the property from Paul Brown, Jennings, and Carrell, receiving a statutory warranty deed. The Tribe was evidently unaware of the fence when it purchased the property. The Tribe's surveyors alerted the Tribe to the presence of the fence in October 2013 while surveying the property "in an effort to take the land into Trust." Clerk's Papers (CP) at 115.

¶5 In September 2014, the Tribe notified the Lundgrens in a letter that the fence did not represent the boundary and that they were asserting ownership rights to the entire property deeded to them in 2013.

The Lundgrens initiated this lawsuit in March 2015. They asked the court to quiet title in the disputed property to them and sought injunctive relief. The Lundgrens moved for summary judgment, arguing they acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction *863 based on the Tribe's sovereign immunity and under CR 12(b)(7),[1] which requires joinder of a necessary and indispensable party under CR 19.[2]

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[1] **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense[ ] may at the option of the pleader be made by motion: ... (7) failure to join a party under [CR] 19.

[2] **(a) Persons to Be Joined if Feasible.** A person who is subject to service or process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would

**572 ¶6 In the trial court, Judge Dave Needy denied the Tribe's motion to dismiss. The Tribe moved for direct discretionary review of this ruling. Judge Susan Cook later granted the Lundgrens' motion for summary judgment, holding the Lundgrens' "claims of title ownership by adverse possession and mutual recognition and acquiescence is established. Legal title to the disputed property is owned by Plaintiffs." CP at 159. Judge Cook noted that the fence was not hidden. Both parties recognized the fence as the boundary line and that it had clearly been on the property for much longer than the necessary 10 years. She noted that the Lundgrens' labor on the property was established by *864 numerous witness declarations. Importantly, she stated that "this is as clear as a case as I've had on the bench." Verbatim Report of Proceedings (VRP) (May 7, 2015) at 20. The Tribe amended its motion for discretionary review to

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render the venue of the action improper, the joined party shall be dismissed from the action.

"**(b) Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

seek review of both Judge Needy's and Judge Cook's orders. We accepted direct review. *See* Order, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (Wash. Feb. 10, 2016).

ANALYSIS

¶7 The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. *See* VRP (Apr. 24, 2015) at 24. While it recognized it could not join the Tribe against its will, the court found the Tribe's attempt to use CR 19 to be "contrary to common sense, fairness, and due process for all involved." VRP (Apr. 24, 2015) at 32.

¶8 The Tribe argues that dismissal is required for two reasons. First, it argues the superior court lacks jurisdiction because the Tribe has sovereign immunity from suit, which neither the Tribe nor Congress has waived for quiet title actions. *See* Appellant's Opening Br. at 10. The Tribe differentiates between an in rem claim and in rem jurisdiction, asserting that "jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties. Thus, the mere fact of an *in rem* claim does not affect or somehow avoid threshold jurisdictional questions such as sovereign immunity." Appellant's Reply Br. at 5. Second, it argues that even if the lower court had in rem jurisdiction to hear the case, CR 19 requires dismissal because the Tribe is a necessary and indispensable party that cannot be

joined due to sovereign immunity. *See* Appellant's Opening Br. at 24-30; Appellant's Reply Br. at 1.

¶9 The Lundgrens acknowledge that the Tribe has sovereign immunity. Resp'ts' Br. at 6 ("The Lundgrens admit that the Tribe is entitled to sovereign immunity."). They argue *865 that because the court has in rem jurisdiction over the quiet title action, personal jurisdiction over the Tribe is unnecessary and its immunity is irrelevant. They also assert that because they obtained title by adverse possession before the Tribe purchased the property, "[t]he Tribe's sovereign immunity does not deprive the court jurisdiction over land the Tribe never owned." Resp'ts' Br. at 23. With regard to CR 19, the Lundgrens argue, "[b]ecause the Court has *in rem* jurisdiction, sovereign immunity is not a bar to jurisdiction, the Tribe is not an indispensable party, and Civil Rule 19 does not prevent the case from proceeding." Resp'ts' Br. at 29.

I. In Rem Jurisdiction

¶10 Superior courts in Washington have jurisdiction to exercise in rem jurisdiction to settle disputes over real property.[3] Quiet title actions are proceedings in rem. *Phillips v. Tompson*, 73 Wash. 78, 82, 131 P. 461 (1913); *see also* 14 Karl B. Tegland,

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[3] Article IV, section 6 of the Washington Constitution expressly establishes that our state's superior courts "shall have original jurisdiction in all cases at law which involve the title or possession of real property." *See also* RCW 2.08.010.

Washington Practice: Civil Procedure § 5:1, at 155 (2d ed. 2009). In such proceedings, the court has jurisdiction over the property itself. *See* Tegland, *supra*. Personal jurisdiction over the landowner is not required. *In re Acquisition of Land & Other Prop. by City of Seattle*, 56 Wash.2d 541, 544-45, 353 P.2d 955 (1960); *see also* ***573** *In re Condemnation Petition City of Lynnwood*, 118 Wash. App. 674, 679 & n.2, 77 P.3d 378 (2003) (noting that quiet title actions are proceedings in which the court can exercise in rem jurisdiction, and that "[c]ourts may have jurisdiction to enter judgment with respect to property . . . located within the boundaries of the state, even if personal jurisdiction has not been obtained over the persons affected by the judgment").

*¶11 A court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion *866 of sovereign immunity. The United States Supreme Court has recognized this principle. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), the county sought to foreclose property within the Yakama Indian Reservation for failure to pay ad valorum taxes. The Yakama Nation argued that state jurisdiction could not be asserted over fee-patented reservation land. The Supreme Court held that the Indian General Allotment Act allowed Yakima County to impose ad valorum taxes on reservation land. 25 U.S.C. §§ 334-381. The Court reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In

other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 869-72, 929 P.2d 379 (1996) (describing *County of Yakima*, 502 U.S. 251).

¶12 This court has similarly upheld a superior court's assertion of in rem jurisdiction over tribally owned fee-patented land. In *Anderson*, this court held that the Grays Harbor County Superior Court had in rem jurisdiction over an action to partition and quiet title to fee-patented lands within the Quinault Indian Reservation. In that case, the Quinault Indian nation purchased a 1/6 interest in the surface estate of fee-patented land subject to a pending suit to partition and to a lis pendens. Relying on *County of Yakima*, and noting that an action to partition and quiet title is "a much less intrusive assertion of state jurisdiction over reservation fee patented land" than taxing and foreclosing fee lands, the court concluded the "Superior Court had proper in rem jurisdiction over [the] suit to quiet title and partition alienable and encumberable fee patented property situated within the Quinault Indian Reservation.... An action for partition of real property is a proceeding *867 in rem." *Anderson*, 130 Wash.2d at 872, 873, 929 P.2d 379. Furthermore, it was not disputed that the trial court had proper jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not

over the entity in personam, but over the property or the "res" in rem.

Anderson, 130 Wash.2d at 873, 929 P.2d 379. The court was exercising jurisdiction over the property, not over the Quinault Indian nation, and thus the land was "subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Anderson*, 130 Wash.2d at 873, 929 P.2d 379. Because the court determined there was in rem jurisdiction, it did not need to address sovereign immunity.

¶13 Relying on *Anderson*, Division One of the Court of Appeals held that the court could exercise in rem jurisdiction in the quiet title action in which the Stillaguamish Tribe of Indians purchased land with notice of a pending quiet title action. *Smale v. Noretep*, 150 Wash. App. 476, 208 P.3d 1180 (2009). In *Smale*, the Smales sought to quiet title to property they claimed to have acquired through adverse possession against Noretep, the non-Indian original owner. After the Smales sued, Noretep sold the property by statutory warranty deed to the Stillaguamish Tribe. The deed noted the pending quiet title action, and the Smales added the Stillaguamish Tribe as a defendant. The Stillaguamish Tribe argued that sovereign immunity barred the action. The court found:

Because courts exercise in rem jurisdiction over property subject to quiet title actions, our Supreme Court has held that transferring **574 the disputed property to a tribal sovereign does not bar the

continued exercise of subject matter jurisdiction over the property. Accordingly, we hold that the superior court's continuing jurisdiction over the land claimed by the Smales for *868 the purposes of determining ownership does not offend the Tribe's sovereignty.

* *Smale,* 150 Wash. App. at 477, 208 P.3d 1180.

¶14 The court noted, "The quiet title action in *Anderson* is similar to the quiet title action here in two crucial ways: both are proceedings in rem to determine rights in the property at issue and neither has the potential to deprive any party of land they rightfully own." *Smale*, 150 Wash. App. at 483, 208 P.3d 1180. The Smales alleged they acquired title to the land via adverse possession *before* the original owner sold to the Stillaguamish Tribe. If this were true, the Stillaguamish Tribe never possessed the land and thus never had land to lose. Nor were the Smales attempting to adversely possess against a sovereign. The court concluded that, as in *Anderson*, the doctrine of sovereign immunity did not apply and did not bar the quiet title action. *County of Yakima, Anderson*, and *Smale* establish the principle that our superior courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.

II. CR 19

¶15 Next, we turn to whether the Tribe must be joined to allow the action to proceed under CR 19. The Tribe asserts that even if the trial court had in rem jurisdiction to hear the case, CR 19 requires dismissal

because the Tribe is a necessary and indispensable party that cannot be joined due to sovereign immunity. Appellant's Opening Br. at 24. We disagree. In reaching our decision, we highlight the importance of CR 19 as a prudential standard that asks not whether a court has the *power* to decide a case, but rather whether it *should*.

¶16 CR 19(a) involves a three-step analysis. *Auto. United Trades Org. v. State,* 175 Wash.2d 214, 222-23, 285 P.3d 52 (2012). First, the court determines whether absent persons are "necessary" for a just adjudication. If the absentee parties are "necessary," the court determines whether *869 it is feasible to order the absentee's joinder. Joinder is generally not feasible when tribal sovereign immunity is asserted. *Auto. United Trades Org.*, 175 Wash.2d at 222 (citing *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 780-81 (9th Cir. 2005)). "If joining a necessary party is not feasible, the court then considers whether, 'in equity and good conscience,' the action should still proceed without the absentees under CR 19(b)." *Auto. United Trades Org.*, 175 Wash.2d at 222. We have recognized that "[d]ismissal under CR 12(b)(7) for failure to join an indispensable party is a 'drastic remedy' and should be ordered only when the defect cannot be cured and significant prejudice to the absentees will result." *Auto. United Trades Org.*, 175 Wash.2d at 222-23 (citing *Gildon v. Simon Prop. Grp., Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006) (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1609, at 130 (3d ed. 2001))).

A. "Necessary" Party

¶17 A party must be joined if adjudication of the matter in the party's "absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." CR 19(a). The heart of the rule is the safeguarding of the absent party's legally protected interest. *Auto. United Trades Org.*, 175 Wash.2d at 223, 285 P.3d 52.

* ¶18 The Tribe asserts that it has a legally protected interest because it claims record title ownership of the disputed property. Appellant's Opening Br. at 25. An inquiry under CR 19, as required by our cases, involves a merit-based determination that an interest will be adversely affected in the litigation. In an in rem action, the property at issue is the focus of the proceeding. The nature and end result of an in rem action **575 determines often competing interests in the property. This analysis is in contrast to civil actions, where the nature and end result is relief or *870 judgment. This difference is important here in the context of a legally protected interest because the Lundgrens are not seeking to divest a sovereign of ownership or control. Rather, they are attempting to retain what they already own. Where no interest exists, nonjoinder presents no jurisdictional barriers. While this analysis seems, in a way, to put "the cart before the horse," this is the relevant CR 19 analysis. Here, as our cases recognize, and as the trial court found,

Sharline and Ray Lundgren acquired ownership by adverse possession long *before* the property was purchased by the Tribe. To find sovereign immunity, some impact on a sovereign's interest should exist. No such interest exists in this case. In the trial court, the Tribe challenged the Lundgrens' lawsuit to quiet title and defended against the motion for summary judgment.[4] The Tribe claimed material issues of fact existed and challenges the summary judgment order here. Considering the facts in the light most favorable to the nonmoving party, we will affirm the trial court's grant of summary judgment if we determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Lundgrens are entitled to judgment as a matter of law if the undisputed facts establish that the Lundgrens would have succeeded on an adverse possession claim. We hold that they have.

¶19 To succeed on an adverse possession claim, possession must be "(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." *ITT Rayonier, Inc. v. Bell,* 112 Wash.2d 754, 757, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984)). "Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years."

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[4] In rem actions require giving notice to any and all persons or entities who may claim an interest in the property to allow those potential claimants the opportunity to participate in the action and assert their interest.

ITT Rayonier, Inc., 112 Wash.2d at 757 (citing RCW 4.16.020). Additionally, we have *871 held that title becomes vested when the elements of adverse possession, specifically the 10 year time period, are established. In *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012), we recognized this principle. In that case, the claim was asserted and we found that title was acquired before the government purchased the land in question. We held that, as long as the requisites of adverse possession were met before the property was transferred to the government, RCW 4.16.160—which otherwise shields the government from claims of adverse possession—did not control. We found that the quiet title lawsuit against the city could proceed since the legal determination only confirmed that the claim of adverse possession was satisfied before the city acquired the property. The principles recognized in *Gorman* are important here because the Lundgrens' claim is based on the fact that title to the land was acquired long before the Tribe purchased the adjacent land.

¶20 The trial court, in granting summary judgment, relied on numerous declarations to find in favor of the Lundgrens. The record establishes that the disputed property has been in the Lundgrens' extended family since 1947, first purchased by Sharline Lundgren's grandmother. A permanent, visible, 1,306 foot long fence marked the boundary between the two properties for decades. The Tribe argues that evidence exists that "shows a dispute as to the parties' knowledge of the existence of the fence." Appellant's Opening Br. at 34. Annabell Brown's

brother- in-law, Ray Brown, confirmed that both families were aware of the boundary fence and treated it as the property line. The Tribe asserts that Annabell Brown's son, David Brown, had no idea the fence was there. Assuming this is true, David Brown's lack of knowledge is not material to the legal issue in this case because the Lundgrens' use of the land was sufficient to satisfy the elements of adverse possession. "Open" and "notorious" mean that activities or objects on the land are visible and discoverable, if not actually known, to the true owner. 17 Wil**576 liam B. Stoebuck & John W. Weaver, *872 Washington Practice: Real Estate: Property Law § 8.11, at 523 (2d ed. 2004). "[T]he owner is charged with constructive notice of permanent, visible objects placed on the ground, even if they are only slightly upon the land and would be seen to intrude only by scrupulous inspection or even by professional survey." Stoebuck & Weaver, *supra*, at 525. The evidence shows that the Lundgrens exclusively possessed and maintained the disputed property. The Tribe asserted no evidence to rebut the testimony that the Lundgrens and their predecessors have gone onto the property, cut trees, trimmed branches, and perhaps mended the fence in the last 70-plus years. Significantly, Judge Cook, in granting summary judgment, stated that "this is as clear as a case as I've had on the bench." VRP (May 7, 2015) at 20. We find the material facts undisputed and affirm the entry of order of summary judgment.

B. "Indispensable" Party

*¶21 Because we have found that the Tribe is not

a necessary party, we need not continue the CR 19 analysis. However, it is important to note that the principle of indispensability is rooted in equitable considerations. *Auto. United Trades Org.*, 175 Wash.2d at 227 (citing *Crosby v. Spokane County*, 137 Wash.2d 296, 309, 971 P.2d 32 (1999)). The central question is whether an action can proceed "in equity and good conscience." CR 19(b). The CR 19 inquiry requires "careful exercise of discretion" and is " 'heavily influenced by the facts and circumstances of individual cases.' " *Auto. United Trades Org.*, 175 Wash.2d at 229 (quoting Wright, Miller & Kane, *supra*, § 1604, at 39). Of importance here is that dismissal would result in no adequate remedy for the plaintiff. Because of a strong aversion to dismissal, great weight is given to this factor. There is no alternative judicial forum for the Lundgrens. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (June 9, 2016), at 11 min., 42 sec. to 12 min., 07 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org (explaining that although there is a tribal court, "the Upper Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs").

¶22 The purpose of CR 19 is to serve " 'complete justice' " by permitting disputes to go forward only when all parties are present to defend their claims. *Auto. United Trades Org.*, 175 Wash.2d at 233. But as we stated in *Automotive United Trades Organization*, " 'complete justice' may not be served when a plaintiff

is divested of all possible relief because an absent party is a sovereign." 175 Wash.2d at 233. In this instance, dismissal leads to no justice at all. In *Automotive United Trades Organization*, we emphasized that sovereign immunity is meant to be raised as a shield by a tribe, not as a sword. Here, a survey of the property was done a month after the property was deeded to the Tribe. *See* Appellant's Opening Br. at 5-6. A survey of the property *before* purchase would have disclosed the existence of the fence and at minimum put a purchaser on notice to determine the property boundaries. The Lundgrens had acquired title by adverse possession decades before the Tribe acquired record title in 2013. After the Lundgrens commenced the quiet title action, the Tribe claimed sovereign immunity and joinder under CR 19 to deny the Lundgrens a forum to acquire legal title to property they rightfully own. The Tribe has wielded sovereign immunity as a sword in disguise. While we do not minimize the importance of tribal sovereign immunity, allowing the Tribe to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder. *See Auto. United Trades Org.*, 175 Wash.2d at 233-34, 285 P.3d 52*. Finding otherwise, as correctly articulated by the trial court, is "contrary to common sense, fairness, and due process for all involved."

VRP (Apr. 24, 2015) at 32. We affirm the superior court.

WE CONCUR:
Owens, J.
Wiggins, J.

**577 González, J.
Yu, J.

STEPHENS, J. (dissenting)

*874 ¶23 It is well established that "tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation." *Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108, 112, 147 P.3d 1275 (2006) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978)). " '[S]ociety has consciously opted to shield Indian tribes from suit,' " *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 230, 285 P.3d 52 (2012) (internal quotation marks omitted) (quoting *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991)), because tribes are " 'separate sovereigns pre- existing the Constitution,' " *Michigan v. Bay Mills Indian Cmty.*, __ U.S. __, 134 S.Ct. 2024, 2030, 188 L.Ed. 2d 1071 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 56, 98 S.Ct. 1670). Brushing aside this fundamental principle, the majority concludes that the Upper Skagit Indian Tribe (Tribe) must either waive its sovereign immunity and defend against Sharline and Ray Lundgren's adverse possession claim, or else risk having judgment entered in its absence. The majority justifies this result on the ground that personal jurisdiction over the Tribe is unnecessary in an in rem action to quiet title. Majority at 579-80. It also insists that the Tribe has no interest in the disputed property because the Lundgrens' claim of adverse possession predates the Tribe's ownership, and therefore the Tribe is not a

necessary party to this suit. *Id.* at 577, 581.

¶24 I respectfully dissent. While the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties, Civil Rule (CR) 19 counsels against exercising this authority in the face of a valid assertion of sovereign immunity. Proceeding without regard to the Tribe's defense, the majority gives "insufficient weight" to the sovereign status of the Tribe and erroneously "reach[es] and discount[s] the merits of [the Tribe's] claims." *Republic of Philippines v. Pimentel,* 553 U.S. 851, 855, 864, 128 S.Ct. 2180, 171 L.Ed. 2d 131 (2008).

*875 ¶25 Applying the analysis of CR 19, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined in this quiet title action. The result is clear under our precedent: we should dismiss this case without reaching the merits of the Lundgrens' claims. Accordingly, I would reverse the superior court and remand for entry of an order of dismissal under CR 12(b)(7).

ANALYSIS

¶26 The only difference between this case and others in which we have respected assertions of tribal sovereign immunity is that the superior court's jurisdiction to quiet title rests on in rem jurisdiction. Focusing on this jurisdictional basis, the majority looks to cases that recognize the superior court's power to proceed. *See, e.g., County of Yakima v. Confederated Tribes & Bands of the Yakima Indian*

Nation, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed. 2d 687 (1992); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 929 P.2d 379 (1996); *Smale v. Noretep*, 150 Wash. App. 476, 208 P.3d 1180 (2009). The majority is correct that these cases support finding "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the status of the property without obtaining in personam jurisdiction over the tribe. Majority at 580-81. If these cases represented the sole line of relevant authority, I might affirm. *Cf. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar "a purely in rem *876 action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. ex rel. Bd. of Trs. of Internal Improvement Tr. Fund*, 78 So.3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land **578 held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] However, a

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[1] It is worth noting, however, that recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity. *See Hamaatsa, Inc. v. Pueblo of San Felipe*, 2016 WL 3382082, at *7 (N.M. June 16, 2016) (holding "regardless of whether Hamaatsa

finding that the court has in rem jurisdiction does not answer the issues before us. None of these cases address the impact of a tribe's CR 19 claim.

I. CR 19 Counsels against Exercising in Rem Jurisdiction in the Face of a Valid Assertion of Sovereign Immunity

¶27 The majority acknowledges that CR 19 reflects a prudential standard: "CR 19 ... asks not whether a court has the *power* to decide a case, but rather whether it *should*." Majority at 11. But the majority fails to acknowledge the significance of the Tribe's interest and the Lundgrens' inability to obtain personal jurisdiction over the Tribe. Instead, the majority seems to believe that because the court has in rem jurisdiction, there is no need to engage in a full CR 19 analysis. This reasoning is flawed. The court's authority to exercise in rem jurisdiction does not

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asserts claims that lie *in rem* or *in personam*, its action against the Pueblo is barred in accordance with federal law. Because tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether Hamaatsa's claim is asserted *in rem* or *in personam*" and specifically noting that while *Anderson* carved out an exception "to tribal sovereign immunity for *in rem* actions," that case was decided before *Bay Mills*, which "unequivocally bars us from carving out a similar exception"); *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) (finding *Bay Mills* reaffirmed the importance of sovereign immunity and that it protects a tribe from any suit absent waiver or congressional authorization, and declining "to draw ... a distinction between *in rem* and *in personam* proceedings"). Because I would decide this case under CR 19, I do not reexamine our precedent in light of *Bay Mills*.

obviate the need to determine which parties must be joined to fully and justly adjudicate the action. Which parties are necessary and indispensable is a separate question from the court's jurisdiction—one I find dispositive in this case given the Tribe's sovereign immunity.

*877 ¶28 Sovereign immunity affects personal jurisdiction. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (" '*Indian Nations are exempt* from suit' " (emphasis added) (quoting *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940))); *see also Anderson,* 130 Wash.2d at 876, 929 P.2d 379 (describing tribal sovereign immunity under the "personal jurisdiction" section).[2] Though personal jurisdiction does not impact a superior court's subject matter jurisdiction for in rem proceedings, *In re Acquisition of Land & Other Prop. by City of Seattle,* 56 Wash.2d 541, 544-45, 353 P.2d

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[2] Sovereign immunity has been variously characterized as a matter of subject matter jurisdiction, and as a matter of personal jurisdiction. *See, e.g., Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009 (10th Cir. 2007) ("'Tribal sovereign immunity is a matter of subject matter jurisdiction.'" (quoting *E.F.W. v. St. Stephen's Indian High Sch.,* 264 F.3d 1297, 1302-03 (10th Cir. 2001))); *Wright,* 159 Wash.2d at 111, 147 P.3d 1275 ("The existence of personal jurisdiction over a party asserting tribal sovereign immunity is a question of law reviewed de novo."). It is not necessary to resolve this dispute here because this case can be resolved under CR 19. Under that standard, in quiet title actions where an absent sovereign may be stripped of land to which it has a legitimate claim, an assertion of sovereign immunity is dispositive and requires dismissal.

955 (1960), it does impact a superior court's ability to join a nonparty. *See Equal Empl Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005) ("Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, *when the absentee is not subject to personal jurisdiction*, and when joinder would destroy subject matter jurisdiction." (emphasis added)); *see also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial 7-37 (2010) ("Joinder is not 'feasible' where ... the party sought to be joined is *immune* from suit"). Personal jurisdiction is thus very relevant to a court's CR 19 analysis.

¶29 The Tribe is not subject to personal jurisdiction because, as is conceded, it has **579 sovereign immunity. Resp'ts' Br. at 6. Therefore, while the Tribe is incorrect that "[in rem] jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties," Appellant's Reply Br. at 5, it is *878 correct that personal jurisdiction, in part, dictates the outcome of this case. We must consider personal jurisdiction under the analysis of CR 19.

II. The Tribe Is a Necessary and Indispensable Party

¶30 We recently addressed CR 19 in a case implicating tribal sovereignty, noting that it applies "when the joinder of absent persons is needed for a just adjudication." *Auto. United Trades Org.*, 175 Wash.2d at 221, 285 P.3d 52. "Where the feasibility of

joinder is contested, courts engage in a three-step analysis." *Id.* First, the court determines whether the absent party is " 'necessary' " under CR 19(a). *Id.* at 222, 285 P.3d 52. If the party is "necessary," the court then determines whether joinder is feasible. *See id.* If it is not feasible to join the party, the court "determine[s] whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." CR 19(b). If the action cannot proceed "in equity and good conscience" without the absent party, that party is considered "indispensable." *Id.*; *Auto. United Trades Org.*, 175 Wash.2d at 229, 285 P.3d 52.

¶31 The party urging dismissal for failure to join a necessary and indispensable party bears the burden of persuasion. *See Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52. "We review a [superior] court's decision under CR 19 for an abuse of discretion and review any legal determinations necessary to that decision de novo." *Id.* We find an abuse of discretion "if the [superior] court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Gildon v. Simon Prop. Grp., Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006). Dismissal under CR 12(b)(7) is a " 'drastic remedy.' " *Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52 (quoting *Gildon*, 158 Wash.2d at 494, 145 P.3d 1196). Because our Civil Rule and Federal Rule of Civil Procedure (FRCP) 19 are substantially similar, we may look to federal case law for guidance. *Id.* at 223, 285 P.3d 52.

¶32 Here, the superior court denied dismissal based on CR 19 without engaging in the required analysis. In its oral *879 ruling, the court stated that although it understood it could not join the Tribe against its will, it seems to me that the Tribe is the one saying that this property, which by its appearance may be adversely possessed long before the Tribe came into it, is asking to bar litigation for the other side rather than the other way around ... and I find that contrary to common sense, fairness, and due process for all involved.

Verbatim Report of Proceedings (Apr. 24, 2015) (VRP) at 32. While the superior court's concerns are understandable, they reflect a desire to reach the merits of the action so that both parties can have their day in court. The majority adopts this approach unapologetically, asserting without a full analysis of the rule's factors that CR 19 requires "a merit-based determination," even though this seems "to put 'the cart before the horse.' " Majority at575. In fact, CR 19 *precludes* a court from considering the merits when one of the parties validly asserts sovereign immunity. *See, e.g., Auto. United Trades Org.*, 175 Wash.2d at 224, 285 P.3d 52 (noting the CR 19 analysis focuses "on whether a party *claims* a protected interest, not whether it *actually has* one"); *see also Gildon,* 158 Wash.2d at 494, 145 P.3 1196 (contrasting "[d]ismissal under CR 12(b) (7)" with "trials *on the merits*" (emphasis added)). As the Supreme recognized in *Pimentel,* beyond the threshold determination that claims are not frivolous in evaluating the CR 19 factors, "consideration of the merits [is] itself an infringement on foreign sovereign

immunity." 553 U.S. at 864, 128 S.Ct 2180. Indeed, it would make no sense that a court evaluating the interests of a party who cannot be joined to an action could summarily decide the party will lose, and therefore has no interests to protect.[3]

A. The Tribe Is a "Necessary" Party

**580 880 ¶33 A party is "necessary" if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in

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[3] The Court of Appeals analysis in *Smale*, on which the superior court and the majority rely, is problematic in this regard when read in light of the CR 19 cases. *See* VRP at 31. The *Smale* court broadly stated that the quiet title action at issue did not have "the potential to deprive any party of land they rightfully own" because the Smales asserted they acquired title by adverse possession before the Tribe bought the property. 150 Wash. App. at 483, 208 P.3d 1180; *see also id.* at 480-81, 208 P.3d 1180 ("[I]f the Smales acquired title before the suit was filed and Noretep attempted to convey the land, Noretep had no title to convey. Thus, the tribe never had any property to lose."). The court justified its consideration of the merits on the procedural posture of the case; the tribe moved to dismiss for lack of jurisdiction under CR 12(b)(1), so the court *assumed* the Smales could prove adverse possession. *Id.* at 481 n. 15, 208 P.3d 1180. The majority's reliance on *Smale* is concerning for two reasons. First, the majority goes further than *Smale* by actually *resolving* the merits. *Compare* majority at 581 (the Lundgrens "are attempting to retain what they *already* own" (emphasis added)), *with Smale,* 150 Wash. App. at 482, 208 P.3d 1180 ("the Smales are attempting to retain what they *allegedly* own" (emphasis added)). Second, no similar presumption to that under CR 12(b)(1) applies in considering CR 19 and a motion to dismiss under CR 12(b)(7).

the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest." CR 19(a)(2) (A). The claimed interest must be legally protected. *Auto. United Trades Org.*, 175 Wash.2d at 224, 285 P.3d 52. As noted above, the main inquiry here is "whether a party *claims* a protected interest, not whether it *actually has* one." *Id.*

¶34 In concluding that the Tribe has no interest because the Lundgrens satisfied the elements of adverse possession, the majority takes its CR 19 analysis too far. Majority at 581-82. The Tribe claims record title ownership of the disputed property. This is a cognizable claim for a legally protected property interest. *See Cady v. Kerr*, 11 Wash.2d 1, 8, 14-15, 118 P.2d 182 (1941) (stating that parties with a legal or equitable interest in property directly affected by a boundary dispute must be defendants in the boundary line adjudication); *Reitz v. Knight*, 62 Wash. App. 575, 585, 814 P.2d 1212 (1991) ("In the context of boundary line disputes, joinder ordinarily is required only of persons who own property adjacent to the disputed boundary line."); RCW 7.28.010 ("[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, *to be brought against the tenant in possession;* if there is no such tenant, then *against the person*881 claiming the title* or some interest therein" (emphasis added)); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458-59 (9th Cir. 1994) (finding the Quinault Indian Nation was a necessary party because it had a claim to escheated property within

its reservation). The Tribe is clearly a necessary party to this lawsuit.

B. The Tribe Cannot Be Joined Due to Sovereign Immunity

¶35 Having determined that the Tribe is a necessary party, the next question is whether the Tribe can feasibly be joined. "Joinder is not feasible when tribal sovereign immunity applies." *Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52. Because the parties agree that the Tribe has not waived its sovereign immunity, the Tribe cannot be joined.[4]

C. The Tribe Is an Indispensable Party

¶36 Because the Tribe is a necessary party that cannot be joined, we must determine if the Tribe is indispensable. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991).

¶37 Federal courts have consistently recognized "that when the necessary party is immune from suit, there may be 'very little need for balancing [FRCP]

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[4] Sovereign immunity may be waived either by the tribe or congressional abrogation. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991). As noted above, the Lundgrens admit that the Tribe is entitled to sovereign immunity. *See* Resp'ts' Br. at 6. They do not argue that either the Tribe or Congress waived this immunity.

19(b) factors because immunity itself may be viewed as the **581 compelling factor.' " *Quileute Indian Tribe*, 18 F.3d at 1460 (quoting *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1499)). Indeed, "comity and respect for sovereign interests often outweigh all other factors in disposing of the joinder question" because " 'society has consciously opted to shield Indian tribes from suit.' " *Auto. United Trades Org.*, 175 Wash.2d at 230, 285 P.3d 52 (internal quotation marks omitted) (quoting *882 *Fluent*, 928 F.2d at 548). Courts, however, may still apply the four factors to determine whether a tribe is an indispensable party. *Quileute Indian Tribe*, 18 F.3d at 1460. These factors are:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). Analyzing and balancing these factors,[5]

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[5] The majority refuses to balance the parties' interests, choosing instead to ignore three of the four factors. Majority at 582-83; *cf. Auto United Trades Org.*, 175 Wash.2d at 229, 285 P.2d 52 ("In examining *each* of the four factors ... the court

I would conclude that the Tribe is an indispensable party.

1. CR 19(b)(1): Prejudice

¶38 Under CR 19(b)(1), we "assess[ ] the *likelihood and significance* of any prejudice." *Auto. United Trades Org.*, 175 Wash.2d at 229, 285 P.3d 52. This factor favors the Tribe for two reasons. First, this court has found that "[i]n evaluating the extent of prejudice, we accord heavy weight to the tribes' sovereign status." *Id.* "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991) (quoting *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). "Among the core aspects of sovereignty that tribes possess—subject ... to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Bay Mills,* 134 S. Ct. at 2030 (quoting *883 *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670). That sovereign immunity against suit "is 'a necessary corollary to Indian sovereignty and self-governance.' " *Id.* (quoting *Three Affil. Tribes of Fort Berthold Reservation v. Wold*

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determines how heavily the factor weighs in favor of, or against, dismissal." (emphasis added)). The sole factor the majority considers conveniently favors the Lundgrens (remedy for the plaintiffs), while the three it ignores favor the Tribe (prejudice, avoiding or reducing prejudice, and adequacy of the judgment).

Eng'g, PC, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed. 2d 881 (1986)). "Where tribal sovereign immunity is concerned, 'respect for the inherent autonomy Indian tribes enjoy has been particularly enduring.' " *Auto. United Trades Org.*, 175 Wash.2d at 230, 285 P.3d 52 (quoting *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999)). This factor strongly favors finding the Tribe to be an indispensable party. *See id.* at 229-31, 285 P.3d 52; *cf. Pimentel*, 553 U.S. at 867, 128 S.Ct. 2180 (discussing cases of joinder and the governmental immunity of the United States; finding under the first factor that "[t]hese cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign").

¶39 Importantly, a judgment entered in the Tribe's absence would not bind the Tribe to a determination that the Lundgrens adversely possessed the disputed property. *See Cady*, 11 Wash.2d at 8, 118 P.2d 182, (explaining parties who have a direct interest in the result of a boundary line dispute must be joined "for otherwise such persons are not bound as to any determination of the location of the boundaries"); *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (finding the tribal council to be a necessary party in a dispute over the beneficial owners of trust property because "even if the Association obtained its requested relief in this action, it would not have complete relief, since judgment against **582 the government would not bind the Council, which could

assert its right to possess the Ranch"); *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1498 (finding that in an action challenging the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority for the Quinault *884 Indian Reservation that "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation").

¶40 A determination of title to the disputed property without the Tribe being a party to the litigation casts a shadow over the Tribe's ownership. *See Quileute Indian Tribe*, 18 F.3d at 1460 (agreeing with the lower court's conclusion "that the Quinaults 'would suffer severe prejudice by not being a party to an action which could deplete the Quinaults' land interests or jeopardize their authority to govern the lands in question' " (quoting *Quileute Indian Tribe v. Lujan*, C91-558C, 1992 WL 605423, at *3 (W.D. Wash. Aug. 28, 1992) (court order)). At the same time, proceeding without the Tribe could prevent the Lundgrens from providing marketable title should they someday wish to sell their property. *See Hebb v. Severson*, 32 Wash.2d 159, 166, 201 P.2d 156 (1948) ("[M]arketable title is one that is free from reasonable doubt and such as reasonably well informed and intelligent purchasers, exercising ordinary business caution, would be willing to accept."). It thus prejudices both the Tribe and the Lundgrens. *See* CR 19(b)(1); *Pimentel*, 553 U.S. at 869, 128 S.Ct. 2180 (FRCP 19(b)'s first factor "directs consideration of prejudice both to absent persons and those who are

parties"). This factor strongly favors dismissal.

2. CR 19(b)(2): Avoiding or Reducing Prejudice

¶41 A further relevant inquiry is whether the court could lessen or avoid prejudice by "protective provisions in the judgment, by the shaping of relief, or [by] other measures." CR 19(b)(2). The Lundgrens do not propose any way the court could lessen prejudice. I am unable to imagine a remedy that would lessen the prejudice that results from quieting title to disputed property in the absence of the record title holder. The majority fails to acknowledge that we cannot require the Tribe to waive its sovereign immunity *885 to lessen prejudice. *See Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500 ("the ability to intervene if it requires waiver of immunity is not a factor that lessens prejudice" (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)). This factor also strongly favors dismissal.

3. CR 19(b)(3): Adequacy of the Judgment

¶42 The third factor—the adequacy of a judgment rendered without the Tribe—also weighs in favor of dismissal. *See* CR 19(b)(3). "Adequacy" here " 'refers to the public stake in settling disputes by wholes, whenever possible.' " *Auto. United Trades Org.*, 175 Wash.2d at 232, 285 P.3d 52 (internal quotation marks omitted) (quoting *Pimentel*, 553 U.S. at 870, 128 S.Ct.2180). "A party who seeks to quiet title to a piece of land must join all known persons who are

claiming title in order to settle the property's ownership without additional litigation." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1621, at 334 (3d ed. 2001). As noted above, the Tribe may not be bound by a determination made in its absence, and the Lundgrens may not be able to obtain secure title absent a judgment against the Tribe. The dispute cannot be completely and definitively settled without joining the Tribe.

4. CR 19(b)(4): Remedy for the Plaintiffs

¶43 Finally, I consider whether the Lundgrens would have a remedy if this case were to be dismissed. *See* CR 19(b)(4). I agree with the majority that this factor weighs in favor of the Lundgrens. It appears that the Lundgrens do not have another judicial forum in which they may seek relief if this claim were to be dismissed for failure to join the Tribe. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe,* No. 91622-5 (June 9, 2016), at 11 min., 42 sec., *recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org (explaining that although **583 there is a tribal court, "the Upper *886 Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs"). However, the majority fails to recognize that "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe,* 910 F.2d at 560. Courts respect the need

to dismiss claims for inability to join a necessary and indispensable sovereign even when doing so denies the plaintiff any remedy. *See, e.g., Pit River,* 30 F.3d at 1102-03; *Quileute Indian Tribe,* 18 F.3d at 1460-61; *Confederated Tribes of Chehalis Indian Reservation,* 928 F.2d at 1500; *cf. Pimentel,* 553 U.S. at 872, 128 S.Ct. 2180 ("Dismissal under [FRCP] 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."). This simply underscores that dismissal under CR 19 can be a drastic remedy, albeit a proper one.

D. Balancing the CR 19(b) Factors

¶44 Balancing these four factors, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined. The most logical result is that this case should be dismissed pursuant to the Tribe's CR 12(b)(7) motion, as the Lundgrens' interest in quieting title to the disputed property yields to the Tribe's interest in maintaining its sovereign immunity. I recognize that dismissal potentially leaves the Lundgrens without recourse. Although in our most recent CR 19 and sovereign immunity case we rejected dismissal due in part to the plaintiff's inability to obtain relief, that was a unique case in which the *State* attempted to assert tribal sovereign immunity "as a sword." *Auto. United Trades Org.*, 175 Wash.2d at 233, 285 P.3d 52. We explained, "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State." *Id.* Dismissal in that case "would have the effect of

immunizing *the State,* *887 not the tribes, from judicial review." *Id.* at 234.[6] Here, the Tribe has properly asserted its sovereign immunity as a shield to protect itself from suit. I would therefore respect the Tribe's status as a sovereign and dismiss the case without reaching the merits of the Lundgrens' claims.

CONCLUSION

¶45 I would reverse the superior court. Under the analysis of CR 19, the Tribe is a necessary and indispensable party that cannot be joined because of sovereign immunity. Accordingly, the Tribe is entitled to dismissal, and I would remand for entry of an order granting the Tribe's motion to dismiss under CR 12(b)(7).

WE CONCUR:

Gordon McCloud, J.

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[6] The majority misses the mark when it asserts that the "Tribe has wielded sovereign immunity as a sword in disguise." Majority at 576. This statement rests on the mistaken premise that the Tribe seeks to take from the Lundgrens "title to property they rightfully own." *Id.* Even accepting as established the Lundgrens' claim that they adversely possessed the disputed property for decades before the Tribe took ownership, they never brought a claim of ownership until now. As a putative defendant in the Lundgrens' quiet title action, the Tribe holds record title—and the validity of that ownership is not in question absent a merits adjudication. Thus, the Tribe is asserting sovereign immunity defensively, to resist being haled into court. The situation could not be more different from the State's offensive assertion of tribal sovereign immunity in *Auto.*

Fairhurst, C.J.
Madsen, J.

APPENDIX B

Note for Motion Calendar:
Friday, April 24, 2015 at 1:30 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife,	NO.: 15-2-00334-1
Plaintiffs,	ORDER DENYING DEFENDANT'S MOTION TO DISMISS ~~[PROPOSED]~~
v.	
UPPER SKAGIT INDIAN TRIBE,	
Defendant.	

THIS MATTER came before the Court on Defendant Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review. The Court has considered the files and pleadings herein, including, without limitation, the following:

1. Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying

Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

2. Declaration of David S. Hawkins in Support of Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review with Exhibit;

3. Plaintiffs' Opposition to Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

4. The Declarations of Sharline Lundgren, Earline Swanson, Ray Brown and Robert Thomas filed in Support of Plaintiff's Motion for Summary Judgment; and

5. Reply, if any.

It is hereby ORDERED that Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review is DENIED.

DATED this 24th day of April, 2015.

DAVE NEEDY
Judge

Skagit County
Superior Court

APPENDIX C

THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents,

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

Skagit County No. 15-2-00334-1

ORDER DENYING FURTHER RECONSIDERATION

The Court considered "APPELLANT'S MOTION FOR RECONSIDERATION". The Court entered an order amending opinion in the above cause on June 8, 2017.

Now, therefore, it is hereby **ORDERED:**

That further reconsideration is denied.

Dated at Olympia, Washington this 12 -day of June 2017, 2017.

For the Court

MARY FAIRHURST,
Chief Justice
Washington State
Supreme Court

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No. 17-387

In The
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN and RAY LUNDGREN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Washington State Supreme Court's narrow exercise of *in rem* jurisdiction in this quiet title case concerning non-reservation land, where no sovereign interest existed because the Tribe could not have received legal title under state law, consistent with Washington state law on compulsory joinder and tribal sovereign immunity, and consistent with this Court's decisions upholding state *in rem* jurisdiction?

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INTRODUCTION

Respondents Sharline and Ray Lundgren commenced this quiet title action to protect their property rights in a strip of land that has been exclusively maintained and possessed by their family since 1947. The Lundgrens acquired title by adverse possession and mutual acquiescence *decades* before the Tribe acquired putative title in 2013 – the result of Washington law automatically vesting title in the Lundgrens via adverse possession and mutual acquiescence. The holding in this case is based on Washington state law on automatic title via adverse possession/mutual acquiescence, compulsory joinder, and *in rem* jurisdiction, although it is fully consistent with the federal case law reviewed and discussed in the decision by the Washington Supreme Court in *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash.2d 857, 389 P.3d 569 (2017) (the "Opinion").

In its Petition for a Writ of Certiorari, the Upper Skagit Indian Tribe (the "Tribe") contends that review by this Court of the decision by the Washington Supreme Court is necessary because the court erred when it ruled that (1) Washington Civil Rule 19 did not require compulsory joinder of the Tribe, (2) state *in rem* jurisdiction allowed the trial court to hear and rule upon this quiet title action, and (3) that sovereign immunity did not bar the trial court's exercise of jurisdiction regardless of *in rem* jurisdiction. As to the first, Washington Civil Rule 19 does not by its terms or any reasonable interpretation trump the court's exercise of *in rem* jurisdiction if a party cannot

be joined. As to the second, sovereign immunity does not bar the exercise of *in rem* jurisdiction where a tribe received a conveyance of title many decades after title was lost through adverse possession. Third, consistent Washington and federal law recognize the appropriateness of the court exercising *in rem* jurisdiction in a case involving a tribe's claim to title. The Opinion by the Washington Supreme Court, which fully addressed compliance with federal law on Indian tribe sovereign immunity as articulated in *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), rested largely on unique Washington law: Civil Rule 19 and its joinder requirement, the unique doctrine of automatic title in adverse possession, and the rule that a sovereign entity obtains no better title than the private party who conveyed to the sovereign. The court applied *Cnty. of Yakima* in its analysis and discussed the holding allowing the assertion of *in rem* jurisdiction by Yakima County over fee-patented reservation land, which was not an assertion of *in personam* jurisdiction over the Yakama Nation. "In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." Opinion at p. 866. The exercise of *in rem* jurisdiction in the present case is even narrower than in *Cnty. of Yakima* in that no reservation or allotted lands were involved.

As held by the Washington Supreme Court, to allow the transfer by a seller without title to a party without any better claim to title would undermine the

rule of law. The rule urged by the Tribe would have resulted in the erosion of three well-established legal principles in Washington jurisprudence:

1. The principle of automatic title through adverse possession, without the requirement of court intervention as a condition to entitlement, as articulated in *El Cerrito v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962);

2. The recognition that the conveyance of real property to a sovereign, after the seller's title was lost via adverse possession, does not vest good title in the sovereign, as articulated in *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012);

3. The principle that Washington courts have *in rem* jurisdiction to rule on title ownership even if one of the parties is a sovereign entity such as an Indian tribe, as recognized in *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), and subsequently applied by the Washington Supreme Court in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 869-72, 929 P.2d 379 (1996).

These bedrock legal principles have been consistently applied and followed in Washington, and Washington residents have arranged their affairs according to

these principles for decades. Importantly, the Tribe provided no explanation to address the broad implications of its position in this case: (1) the obvious unjust result of allowing a conveyance to an Indian tribe of a title previously lost by adverse possession and thereby automatically extinguish the adverse possession title, all with no possibility of judicial review (the Tribe did not provide any avenue of challenge in its own courts (Opinion, p. 872-73)); and (2) a tribe's claim to property anywhere in the state, regardless of who owns title under Washington law, would be absolutely immune to challenge by the true owner.

The Washington Supreme Court ruled that sovereign immunity does not bar this quiet title action because the Lundgrens' adverse possession-derived title to the disputed property was perfected while it was still owned by private individuals. That adverse possession title was, under Washington law, entitled to equal status with title derived by transfer via deed, all prior to a court's ruling. Washington law has consistently recognized that sovereign immunity does not bar a quiet title action when the claimant adversely possessed the disputed property *before* the sovereign acquired record. *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012).

Whatever conflict might exist about the scope of state *in rem* jurisdiction over tribal property in other contexts, this case would be a poor vehicle for resolving it. The Tribe never acquired title to this sliver of disputed property, part of a 38-acre parcel over which no dispute exists, because the seller had no title to the

sliver. Washington law holds that trial courts possess *in rem* jurisdiction to determine property rights in real property located in Washington state, irrespective of whether the court has jurisdiction over the claimants, and that Washington Civil Rule 19 does not prevent the quiet title action from proceeding in the face of a sovereign immunity claim by a tribe.

REASONS FOR DENYING THE PETITION

A. No split of authority exists between the circuit courts.

The split of authority as characterized by the Tribe does not extend to the issue ruled upon by the Washington Supreme Court – the interplay of sovereign immunity under state law with compulsory joinder in the context of a quiet title action. In *Cnty. of Yakima* and *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), the Court affirmed the right of states to impose property taxes on land allotted under acts of Congress and later re-acquired by tribes in fee simple. The succeeding issue in *Oneida Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2014), and *Cayuga Indian Nation of New York v. Seneca County, N.Y.*, 761 F.3d 218 (2d Cir. 2014), involved the right of counties to foreclose on the properties owned by the tribes. The issue of whether a tax foreclosure action was *in rem* and therefore not prohibited by sovereign immunity is qualitatively different than the issue at bar: whether a private party is entitled to

protection of property rights, via *in rem* jurisdiction, when that party would have no other forum in which to protect its rights, and when the rights existed *before* the tribe owned any interest in the subject property. Moreover, no split between federal circuit courts exists on the issue here: whether state *in rem* jurisdiction exists when an Indian tribe received bare legal title from a party with no title to give. Such an issue is both rare and not addressed by federal courts let alone more than a handful of state cases. This is an issue of state law and is the reason federal courts have not weighed in. A state's jurisdiction to control the ownership and disposition of real property within its territory is a core state prerogative. *See Fall v. Eastin*, 215 U.S. 1 (1909); *Clarke v. Clarke*, 178 U.S. 186 (1900).

The New Mexico case, *Hamaatsa, Inc. v. Pueblo of San Felipe*, No. 2017-NMSC-007, 388 P.3d 977 (N.M. 2016) is inapposite. First, no part of the court's analysis in *Hamaatsa* suggests that New Mexico's jurisprudence includes precedent comparable to Washington's (1) law of automatic adverse possession title without court intervention, (2) recognition that the conveyance of property to a sovereign, after title was lost via adverse possession, does not vest title in the sovereign, and (3) recognition that courts have *in rem* jurisdiction to rule on title ownership even if one of the contesting parties is an Indian tribe. These distinctions are both central and critical given that in *Hamaatsa* the real property at issue was undisputably owned by the tribe. At issue in *Hamaatsa* was an access road across the tribe's property, with a claim by the plaintiff access

road user that it was entitled to use the road as a public highway. There was no contention that the tribe did not own title to the subject property, making the analysis inapplicable to the present facts where, under Washington law, the Tribe received a deed from a party without title. The other state cases discussed in *Hamaatsa*, *Anderson* and *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 2002 ND 83, 643 N.W.2d 685 (2002), supported the exercise of *in rem* jurisdiction in cases where a tribe claimed an interest in the subject property.

The Court's decision in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), is inapplicable to the present case, as *Bay Mills* did not concern or address the issue of *in rem* jurisdiction in the context of an Indian tribe that had no sovereign interest because it had no interest in the property under state law. Moreover, the Court observed in *Bay Mills* that Michigan had recourse to enforce its own statutory provisions and procedures allowing action for conduct in violation of state law. The only remedy afforded to the Lundgrens – *in rem* jurisdiction – is a narrow state law remedy that is not an abrogation of tribal sovereign immunity. The Opinion is not directly or indirectly contrary to the holding or rationale of *Bay Mills*, and does not test the edges of *Bay Mills* by, for instance, delving into the area of state enforcement of state law that would prohibit commercial activity on off-reservation land. Indeed, this Court noted in *Bay Mills* that sovereign immunity might not apply where, as here, a party

"who has not chosen to deal with a tribe . . . has no alternative way to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. 2036 n.8.

B. The Lundgrens' title by adverse possession was automatic and ripened long before the tribe acquired bare legal title.

The Tribe's Petition minimizes the importance under Washington law of the principle that adverse possession title constitutes valid and *immediate* title. The fact that a court has not ruled on the validity of title in a quiet title action does not detract from the legitimacy of the adverse possession title. When a person adversely possesses real property for ten years, such possession ripens into an original title. *El Cerrito v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962). Divestment of title does not occur differently or more easily to the person who acquires title passively by adverse possession than to the person who acquires title by deed. *Id.* Once a person acquires title by adverse possession, he cannot be divested of title to the property by "parol abandonment," relinquishment, verbal declarations, or any other act short of what would be required had he acquired his title by deed. *Mugaas v. Smith*, 33 Wash.2d 429, 431, 206 P.2d 332 (1949). A person who acquires title by adverse possession can convey it to another party without having had title quieted in him prior to the conveyance. *El Cerrito*, 60 Wash.2d at 855. The Lundgrens established that all of these legal requirements were fulfilled for a period of well over

ten years, which period elapsed more than 50 years before the commencement of their lawsuit.

C. Sovereign immunity does not bar this quiet title action because the court's *in rem* jurisdiction concerns the property itself – not the claimants.

Washington case law has consistently recognized that *in rem* jurisdiction vests broad authority in the courts to resolve disputes over real property, and that the court's jurisdiction is over the property itself. Personal jurisdiction over the contesting parties, even those with valid claims of ownership, is not necessary. *In re Acquisition of Land & Other Prop. By City of Seattle*, 56 Wash.2d 541, 544-45, 353 P.2d 955 (1960); *In re Condemnation Petition of City of Lynnwood*, 118 Wash.App. 674, 679, 77 P.3d 379 (2003).

Washington courts have consistently held that, under limited circumstances, courts may exercise *in rem* jurisdiction despite the assertion of immunity by a sovereign. Title by adverse possession can be acquired against a sovereign where the property was adversely possessed *before* the sovereign acquired title. *Gorman*, 175 Wash.2d at 70. The *Gorman* Court reasoned:

> If a claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possessor is automatically vested with title to the subject property. The

> prior owner cannot extinguish this title by transferring record title to the state.

Id. at 74-75. While the sovereign in *Gorman* was a city, the principle was also applied to an Indian tribe that obtained title from a private party that had previously lost title via adverse possession. *Smale v. Noretep*, 150 Wash.App. 476, 208 P.3d 1180 (2009).

If the Tribe's immunity argument is accepted, anyone in Washington state who lost their interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to an Indian tribe. In other words, a tribe would automatically win despite never acquiring legitimate title. The Washington Supreme Court directly refuted this "absurd" consequence in *Gorman*, at p. 74.

D. This Court's *County of Yakima* case fully supports the majority opinion issued in this case.

That Washington courts have jurisdiction over this matter despite a claim of sovereign immunity was fully addressed and resolved by this Court. In *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), Washington courts were held to have jurisdiction to authorize property taxes on the basis of alienability of allotted lands and not on the

basis of jurisdiction over their Indian owners. In so ruling, the Court upheld the county's assertion of jurisdiction even over on-reservation land "because the jurisdiction is *in rem* rather than *in personam*. . . ." *Id.* at 264-65. This case involves the state's authority to determine the ownership of off-reservation land to which the Tribe has never had title.

No practical or theoretical reason exists to treat the exercise of *in rem* jurisdiction over a quiet title action differently than *in rem* jurisdiction over a property tax case affecting tribal land. *In rem* jurisdiction over a claim involving title to real estate is a more orthodox application than over a claim involving *ad valorem* taxes. No logical distinction, nor meaningful difference, distinguishing the ruling and rationale of *Cnty. of Yakima* from the present case has been presented.

The court in *Anderson* addressed the Tribe's contention that *Cnty. of Yakima* allows only a limited exercise of *in rem* jurisdiction in cases involving federally-issued fee patent property (Motion at p. 9):

> The Quinault Nation argues that County of Yakima requires a finding in this case of express statutory authority in the GAA granting state jurisdiction over action involving reservation fee patented lands. But the Nation interprets the case too narrowly. . . . The Court also added that, while the provision removing 'all restrictions as to sale encumbrance, or taxation of [fee patented reservation] land' describes a state's entire range of 'jurisdiction to

> tax' allotted land, it does not purport to describe the entire range of a state's in rem jurisdiction over such land.

Anderson at p. 874. Moreover, *Anderson* notes that "[b]ecause the res or property is alienable and encumberable under a federally issued fee patent, it should be subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Id.* at p. 873. Allowing state courts to exercise *in rem* jurisdiction over land that is neither fee patent nor allotted under the GAA, such as the case here, is an even easier conclusion to draw.

A review of *Cnty. of Yakima's* treatment of *in personam* and *in rem* jurisdiction over Indian tribes also reveals no constraint on the narrow type of state court *in rem* jurisdiction exercised in the present case. The Court rejected the contention that its prior cases prohibited state court jurisdiction over Indian-owned land:

> The Yakima Nation and the United States deplore what they consider the impracticable, *Moe*-condemned 'checkerboard' effect produced by Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either.

Cnty. of Yakima at 691. Again, this sanction of *in rem* jurisdiction concerns reservation land – a more intrusive form of jurisdiction than the non-reservation land involved in the present case.

E. Washington Civil Rule 19 did not prevent the court's exercise of *in rem* jurisdiction.

Civil Rule 19 is a state rule of procedure and purely a matter of state law for interpretation and application by state courts. The Washington Supreme Court reasoned in the Opinion that, as a purely prudential standard, Civil Rule 19 does not require dismissal given that Washington trial courts have the power to exercise jurisdiction in an *in rem* action when the action concerns land acquired by adverse possession/mutual acquiescence before the tribe acquired record title. As the court found, the existence of sovereign immunity relies on the existence of a sovereign's interest. If no such interest exists, where for instance the sovereign could not have received actual legal title, there can be no sovereign immunity and nonjoinder of the tribe as a party is not a jurisdictional bar.

The fact that the Lundgrens had no recourse in tribal court to protect their family's 60-plus year interest in the subject property, or to receive any kind of justice, lies in stark contrast to Washington's Constitution, which vests in superior courts original subject matter jurisdiction to resolve *all* issues involving real property ownership. *Article IV, Section, Washington*

Constitution. The purpose of Civil Rule 19 is to serve "complete justice" by permitting disputes to proceed to adjudication only when all the parties can defend their claims. *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 233, 285 P.3d 52 (2012). However, complete justice is not served if a party is denied relief because an absent party is a sovereign. *Id.* at 233.

CONCLUSION

Washington courts have *in rem* jurisdiction to protect property interests established before attempted conveyance to a sovereign entity such as an Indian tribe. The trial court in this case carefully and deliberately avoided exercising personal jurisdiction over the Tribe, and limited its jurisdiction solely to the *res* at issue in the case given the fact that the Tribe could exercise no sovereign interest. The court's decision in this case was squarely in line with *County of Yakima* and not opposed by subsequent decisions of this Court, and this consistent precedent controls and provides stable guidance for parties to structure their affairs. None of the other 29 Indian tribes in Washington State filed an

amicus curiae brief in the state courts advocating on behalf of the Tribe's position. The Lundgrens request that the petition be denied.

RESPECTFULLY SUBMITTED this 13th day of October 2017.

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RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Lundgrens' opposition rests on two main arguments: (1) Washington property law is exceptional because of its "unique doctrine of automatic title in adverse possession"; and (2) no sovereign interests would be offended by the court's exercise of jurisdiction in the quiet title action because the Lundgrens are likely to prevail on the merits of their adverse possession claim. Both arguments fail as a matter of law. Under the Supremacy Clause, if a "unique" feature of Washington law conflicts with federal law, it must yield to the interests protected by federal law. Nor is there a "likelihood of success on the merits" condition to the viability of a sovereign immunity defense. To hold otherwise would render moot the common law shield of sovereigns.

The Lundgrens' opposition attempts to bury the clear court split on the law in immaterial factual distinctions. The lower courts are divided on a basic legal issue that this petition squarely presents: are *in rem* actions an exception to the jurisdictional bar of sovereign immunity where there has been no waiver by the Tribe or abrogation by Congress?

In the 5-4 decision below, the Washington Supreme Court answered yes: *in rem* jurisdiction is an exception to sovereign immunity even where no waiver or abrogation has occurred. The North Dakota Supreme Court agreed, but both rulings conflict with the decisions of the Second Circuit and New Mexico Supreme Court.

The North Dakota and Washington rulings also rest on a misreading of this Court's holding in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). That decision did not create a third exception to sovereign immunity for cases proceeding *in rem* against tribal property interests. The Lundgrens' arguments to the contrary highlight the intensifying debate over this important issue of federal law.

This Court should accept review to resolve the split in authority and conform the decision below to the unambiguous rulings of this Court.

REASONS WHY CERTIORARI IS WARRANTED

A. Tribal sovereign immunity is a matter of federal law, which preempts conflicting state law under the Supremacy Clause.

The Lundgrens argue that "[t]his is an issue of state law" turning on the "unique doctrine of automatic title in adverse possession" under Washington law.[1] But the issue raised here does not turn on the state law elements of the specific claim against the Tribe—establishing adverse possession. It is controlled by the Tribe's sovereign immunity, which "is a matter of federal law." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 759 (1998).

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[1] Opp'n to Pet. for Cert. at 2, 6.

Tribal immunity is an absolute jurisdictional bar, absent abrogation by Congress or waiver by the Tribe. *Id.* at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). The Tribe did not waive immunity. Nor has there been abrogation: the Washington Supreme Court did not even examine the issue much less hold that Congress had unequivocally abrogated tribal sovereign immunity where an action lay *in rem*, as here, to quiet title in disputed property held by tribes. Since neither exception to sovereign immunity applies, the Tribe's sovereign immunity barred suit.

Tribal immunity "is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756. Any state law that purports to diminish tribal immunity recognized under federal law is preempted under the Supremacy Clause. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) ("The Supremacy Clause makes the laws of the United States 'the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Put simply, federal law preempts contrary state law." (citing U.S. Const., Art. VI, cl. 2)); *accord Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431 (1989) ("Since the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments . . . , to recognize and respect that interest in the course of their activities.").

If Washington law contains a "unique" approach to adverse possession that would, if upheld, defeat tribal immunity, federal law preempts that result.

B. "Likelihood of success on the merits" is irrelevant to the viability of sovereign immunity.

The Lundgrens argue that "sovereign immunity does not bar the exercise of *in rem* jurisdiction where a tribe received a conveyance of title many decades after title was lost through adverse possession."[2]

The purpose of sovereign immunity—to prevent "the indignity of subjecting a [sovereign] to the coercive process of judicial tribunals at the instance of private parties," *Alden v. Maine*, 527 U.S. 706, 749 (1999)—would be entirely defeated if the availability of the shield turned on the merits of the underlying claims. *Accord Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998) ("At its core, sovereign immunity deprives the courts of jurisdiction irrespective of the merits of the underlying claim."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("since the issue of tribal sovereign immunity is jurisdictional in nature, we must first determine whether the Band has effectively waived tribal immunity—thus making it amenable to suit in federal court—irrespective of the merits of Pan Am's tort and contractual claims" (internal citations omitted)); *Foremost-McKesson, Inc. v. Islamic*

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[2] Opp'n to Pet. for Cert. at 2.

Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits" (citation omitted)).

The gist of the Lundgrens' argument appears to be that the Tribe never had title so the Tribe is being deprived of nothing. In fact, the Tribe did pay for the land. But the issue here is not whether the Tribe has title, or ever had title, or any other aspect of the merits of the case. The issue is whether the Tribe is subject to an action that tests its title. It is not.

C. The decision below contributes to an intensifying conflict among the lower courts.

The Lundgrens attempt to dismiss the court split based on factual distinctions: e.g., that the contrary rulings involved actions to tax or foreclose on tribal property or actions in which the tribe's title to property was not in question.[3] But these factual distinctions are beside the point.[4] The cases on either side of the split involve *in rem* actions. The courts articulate their rulings based on their view of whether *in rem* jurisdiction overcomes the jurisdictional bar of

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[3] Opp'n to Pet. for Cert. at 5–8.

[4] The Lundgrens' subsequent arguments show they recognize the irrelevance of this distinction. *Id.* at 11 ("No practical or theoretical reason exists to treat the exercise of *in rem* jurisdiction over a quiet title action differently than *in rem* jurisdiction over a property tax case affecting tribal land.").

sovereign immunity. *Compare Lundgren v. Upper Skagit Indian Tribe*, 187 Wash. 2d 857, 865–67, 389 P.3d 569 (2017) (citing to *County of Yakima* for proposition that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity"), *and Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W. 2d 685, 691, 694 (N.D. 2002) (holding that *in rem* condemnation action may proceed and citing *County of Yakima* for the proposition that "[c]ourts have recognized distinctions in application of the doctrine of tribal sovereign immunity based upon the in rem or in personam nature of the proceedings"), *with Cayuga Indian Nation v. Seneca Cty.*, 890 F. Supp. 2d 240, 247–48 (W.D.N.Y. 2012) (rejecting argument that *County of Yakima* "stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* [foreclosure] proceedings"), *aff'd*, 761 F.3d 218, 221 (2d Cir. 2014) (declining to read an "implied abrogation" into *County of Yakima* or "draw . . . novel distinctions—such as a distinction between *in rem* and *in personam* proceedings" as applied to the doctrine of tribal sovereign immunity from suit), *and Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (rejecting characterization of *County of Yakima* as authorizing "the tribe's amenability to suit in court based on a concept of an *in rem* exception to immunity" and noting that "in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims").

The reasoning by each court shows that the split does not arise from factual differences but from

opposing views of the law: the effect of *in rem* jurisdiction on tribal sovereign immunity. The New Mexico Supreme Court and the dissenting justices in the decision below expressly identified this split in articulating their legal analysis of the sovereign immunity issue. *See Hamaatsa*, 388 P.3d at 986 (acknowledging the contrary decisions by the North Dakota and Washington Supreme Courts but choosing "to follow the Second Circuit, and thereby refus[ing] to recognize an exception to tribal sovereign immunity for *in rem* proceedings"); *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting) (acknowledging that "recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity").

The same legal controversy is also evident among the lower federal and state courts.[5] This Court's intervention is necessary to clarify its holding in *County of Yakima* to resolve this split.

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[5] Pet. for Cert. at 8–10.

D. The decision below is contrary to this Court's decisions in *County of Yakima* and *Bay Mills*.

The decision below is not supported by this Court's holding in *County of Yakima*. That case turned on the finding of express abrogation in the Burke Act proviso.[6] The purpose of the discussion of *in rem* jurisdiction in that case was to explain that the ruling in *County of Yakima* was consistent with an earlier Supreme Court decision.[7] The passing discussion of *in rem* jurisdiction in *County of Yakima* sheds no light on the legal conflict at issue here.[8] The Lundgrens cite only one Washington case to support their contrary argument.[9] Washington cases cannot be determinative of this issue of federal law. In fact, the dissenting justices in the decision below said that Washington case law may "rest[] on a misreading of *County of Yakima*," which "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Lundgren*, 187 Wash. 2d at 876 n.1 (Stephens, J., dissenting).

---

[6] Pet. for Cert. at 10–13.

[7] Pet. for Cert. at 12.

[8] Opp'n to Pet. for Cert. at 10–11.

[9] Opp'n to Pet. for Cert. at 10–13 (citing *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873–74, 929 P.2d 379 (1996)).

In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), this Court reaffirmed that a tribe may lose sovereign immunity in only two ways: (1) if Congress abrogates sovereign immunity; or (2) if the tribe waives sovereign immunity. *Id.* at 2030–31.

This Court has recognized "Congress' role in reforming tribal immunity" and has held that courts should defer to Congress because it "is in a position to weigh and accommodate the competing policy concerns and reliance interests," and "address the issue by comprehensive legislation." *See Kiowa Tribe*, 523 U.S. at 759–60 (declining request to create exception to sovereign immunity for suits arising from a tribe's commercial activities, even when they take place off Indian lands). "Congress has acted against the background of [Supreme Court] decisions" and "restricted tribal immunity from suit in limited circumstances." *Id.* at 758 (citing mandatory liability insurance and gaming activities as examples).[10]

---

[10] For this reason, the Lundgrens' claims about the risks of upholding the Tribe's sovereign immunity in this case are hyperbole ("If the Tribe's immunity argument is accepted, anyone in Washington state who lost their interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to an Indian tribe" Opp'n to Pet. for Cert. at 10). In areas where Congress deems it appropriate, legislation is introduced to abrogate sovereign immunity in specific situations. *See*, e.g., To Abrogate the Sovereign Immunity of Indian Tribes as a Defense in Inter Partes Review of Patents, S. 1948, 115th Cong. (2017) (response to patent assignments to Indian tribes in attempt to protect patents from invalidity challenges in *inter partes* review before the Patent Trial and Appeal Board).

In the absence of abrogation or waiver, the courts are not at liberty to recognize a third exception to sovereign immunity. Here, absent either exception, the Tribe's sovereign immunity barred jurisdiction.

E. The decision below presents a threshold jurisdictional issue of federal law that merits clarification of this Court's holding in *County of Yakima*.

The relevant facts controlling the outcome of this case are undisputed. The Lundgrens do not argue that there has been either waiver or congressional abrogation of sovereign immunity. Accordingly, this case is an ideal vehicle to resolve the narrow issue dividing the lower courts over the reach of this Court's holding in *County of Yakima*.[11]

---

[11] Because this petition does not request review of the application of Washington Civil Rule 19, the Tribe will not address the Lundgrens' arguments regarding that rule.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2017

No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,
Petitioner,
v.
SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
SEPTEMBER 11, 2017
CERTIORARI GRANTED DECEMBER 8, 2017

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Case Information

15-2-00334-1 | SHARLINE LUNDGREN, ET VIR VS UPPER SKAGIT INDIAN TRIBE

Case Number	Court
15-2-00334-1	Skagit

File Date	Case Tyle	Case Status
03/04/2015	QTI Quiet Title	Return from Appeal

Party

Plaintiff
LUNDGREN, SHARLINE

Plaintiff
LUNDGREN, RAY

Defendant
UPPER SKAGIT INDIAN TRIBE, NFN

Active Attorneys
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Attorney for Plaintiff/Petitioner (Participant)
Ellerby, Scott Martin

Events and Hearings

Date	#	Docket Text
03/04/2015		Filing Fee Received
03/04/2015	1	Summons
03/04/2015	2	Complaint to Quiet Title and Equitable Relief
03/24/2015	3	Upper Skagit Indian Tribe's Special Notice of Appearance
03/26/2015	4	Plaintiffs' Motion for Summary Judgment And, In the Alternative, Preliminary Injunction
03/26/2015	5	Declaration of Robert Thomas in Support of Plaintiffs' Motion for Summary Judgment
03/26/2015	6	Declaration of Sharline Lundgren in Support of Plaintiffs' Motion for Summary Judgment
03/26/2015	7	Declaration of Earline Swanson
03/26/2015	8	Declaration of Ray Brown
03/26/2015	9	Note for Motion Docket

03/27/2015	10	Recusal of Judge Rickert Notified by Court Admin; Judge Michael E. Rickert
03/27/2015	11	Void-Sub Number Voided
03/27/2015	12	Void-Sub Number Voided
03/27/2015	13	Praecipe Re Declaration of Robert Thomas in Support of Plaintiffs' Motion for Summary Judgment
03/30/2015	14	Acknowledgment of Receipt and Acceptance of Service
04/01/2015	15	Notice of Association of Counsel; Peter R. Dworkin
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04/10/2015	19	Declaration of David Hawkins in Support of Motion to Dismiss
04/10/2015	20	Note for Calendar Court Admin; Hawkins Motion to Dismiss
04/14/2015	21	Note for Calendar Court Admin; Hawkins Motion to Dismiss
04/20/2015	22	Plaintiffs' Opposition to Defendant Upper Skagit Indian Tribe's Motion to Dismiss

04/22/2015	23	Upper Skagit Indian Tribe's Reply in Opposition to Plaintiffs' Response
04/22/2015	24	Void-Sub Number Voided
04/22/2015	25	Void-Sub Number Voided
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04/27/2015	30	Declaration of Peter Dworkin
04/27/2015	31	Declaration of David L. Brown
04/27/2015	32	Declaration of Robert A. Hayden
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06/08/2015	52	Affidavit/Declaration/Certificate of Service

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Appellate Court Case Summary

Case Number: 916225
Filing Date: 04-30-2015
Supreme Court

Event Date	Even Description	Action
04-30-15	Notice of Appeal	Filed
05-01-15	Motion for Stay	Filed
05-04-15	Case Received and Pending	Status Changed
05-04-15	Letter	Sent by Court
05-05-15	Affidavit - Other	Filed
05-05-15	Answer to motion	Filed
05-06-15	Ruling on Motions	Filed
05-06-15	E-mail	Sent by Court
05-06-15	Reply to Response	Filed
05-06-15	E-mail	Sent by Court
05-08-15	Notice of Discret Review to Supreme Crt	Filed
05-08-15	Motion to Extend Time to File	Filed
05-08-15	Ruling on Motions	Filed
05-12-15	Amended Notice of Appeal	Filed
05-12-15	Letter	Sent by Court
05-15-15	Motion for Discretionary Review	Not filed

Event Date	Even Description	Action
05-29-15	Statement of Grounds for direct Review	Filed
06-03-15	Designation of Clerks Papers	Filed
06-04-15	Amended DES	Filed
06-09-15	Answer to Stmt of Grounds for direct rev	Filed
06-09-15	Statement of Arrangements	Filed
06-12-15	Clerk's Papers	Filed
07-20-15	Report of Proceedings	Received by Court
07-27-15	Report of Proceedings	Received by Court
08-19-15	Motion to Extend Time to File	Filed
08-19-15	Ruling on Motions	Filed
09-30-15	Supplemental Designation of Clerk's Papers	Filed
10-02-15	Appellants brief	Filed
10-05-15	Supplemental Clerk's Papers	Received by Court
11-02-15	Respondents brief	Filed
12-02-15	Appellants Reply brief	Filed
12-11-15	Motion - Other	Filed
02-09-16	Set for Motion Calendar	Status Changed

Event Date	Even Description	Action
02-10-16	Other Order	Filed
02-10-16	Ready	Status Changed
03-01-16	Oral Argument Setting Letter	Sent by Court
03-01-16	Set on a calendar	Status Changed
04-21-16	Notice of Intent to Withdraw	Filed
06-09-16	Heard and awaiting decision	Status Changed
06-09-16	Oral Argument Hearing	Scheduled
02-16-17	Opinion	Filed
02-16-17	Decision Filed	Status Changed
03-08-17	Notice of Association of Counsel	Filed
03-08-17	Motion for Reconsideration	Filed
03-24-17	Calling for Response	Filed
04-07-17	Answer to motion for Reconsideration	Filed
06-08-17	Order Changing Opinion	Filed
06-12-17	Order on Motion for Reconsideration	Filed
06-29-17	Mandate	Filed

Event Date	Even Description	Action
06-29-17	Disposed	Status Changed
09-18-17	Letter	Received by Court
12-15-17	Letter	Received by Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	COMPLAINT TO QUIET TITLE AND FOR EQUITABLE RELIEF
v.	
UPPER SKAGIT INDIAN TRIBE,	
Defendant.	

COME NOW the above-named Plaintiffs, by way of complaint against Defendant Upper Skagit Indian Tribe, and allege as follows:

I. PARTIES

1.1 Plaintiffs Sharline Lundgren and Ray Lundgren, wife and husband, are the owners of Tax Parcel No. P33568 commonly known as 6315 Hobson Road, Bow, Skagit County, Washington, and legally described on attached Exhibit A.

1.2 Defendant Upper Skagit Indian Tribe is a federally-recognized Indian Tribe that currently owns Tax Parcel No. P33521, Skagit County, Washington, and legally described on attached Exhibit B.

II. JURISDICTION AND VENUE

The Court has jurisdiction over this in rem action pursuant to RCW 2.08.010. Venue is proper in Skagit County under RCW 4.12.010.

III. DESCRIPTION OF PROPERTY

The disputed property in this quiet title action consists of a strip of land spanning the width of Government Lot 1, on which Defendant is the record title holder, and described on Exhibit B, as shown on the survey map prepared on September 2, 2014 by professional land surveyor Peter Brands of Pacific Surveying & Engineering Inc. in Bellingham, Washington, a copy of which is attached hereto as Exhibit C. The disputed property is highlighted on the survey, which shows a "Barb Wire Fence" 19' North of the common property line on the East end and 25' North of the common property line on the West end (the "Disputed Property"). Plaintiffs and their predecessors in title have since the 1940s maintained the barbed wire fence North of the surveyed property line between Plaintiffs' and Defendant's properties. Photos of the fence are attached hereto as Exhibit D, which show that the fence is aged but maintained and standing. The photos show that the barbed wire, which is attached to fir trees along its length, has substantial tree growth over the wire occurring over many decades. Defendant obtained the property described on Exhibit B in 2013, which property has not been occupied for decades.

IV. NATURE OF CLAIMED TITLE

4.1 A right to title to the Disputed Property lays in Plaintiffs by virtue of decades of exclusive use and enjoyment by prior owners of the property, and by virtue of their own use. Record title to the Disputed Property lays in Defendants. Plaintiffs and their predecessors in title have used and been in actual possession of the Disputed Property which use and possession has been exclusive, hostile, open, notorious, continuous, adverse to Defendant and Defendant's predecessors in title, under a claim of right, and with the knowledge of Defendant and Defendants' predecessors in title at a time when they were able in law to assert their rights. That possession and use of the Disputed Property began decades ago and continues to the present day. Adverse possession and title to the Disputed Property ripened before Plaintiffs acquired the property in 1968 and has continued uninterrupted since 1968 to the present. Plaintiffs obtained the property by inheritance from Plaintiff Sharline Lundgren's grandmother Lola Brymer, who died in 1968 and owned and lived on the property since 1947.

4.2 During said time no persons other than Plaintiffs or their predecessors in title have claimed any right, title, or interest in or to the Disputed Property, Plaintiffs' title in and to the Disputed Property is superior to the title of Defendant in and to the same property. Plaintiffs are the true owners of the Disputed Property free and clear from all claims of Defendant and its successors and assigns.

4.3 On February 24, 2015, Defendant's workers and agents began to place new fence posts in alignment with the surveyed common property boundary, and to otherwise disturb and modify the Disputed Property. Counsel for Plaintiffs notified counsel for Defendant by email requesting that Defendant cease any work on the Disputed Property on February 25, 2015. A true and correct copy of the email is attached hereto as Exhibit E. Counsel for Defendant responded by email clearly stating that Defendant intends to terminate Plaintiffs' use and enjoyment of the Disputed Property. A true and correct copy of the email is attached hereto as Exhibit F.

4.4 Plaintiffs' and Defendant's predecessors in title defined their common boundary in good faith, and the common boundary so defined has been acquiesced in, ratified, acknowledged, recognized, approved and acted upon by Plaintiffs, Defendant, and their respective predecessors.

4.5 The common boundary acquiesced and defined by Plaintiffs' and Defendant's predecessors in title should govern the property rights of Plaintiffs and Defendant, and should be established as the legal common boundary line.

4.6 Plaintiffs, Defendant, and their respective predecessors actually demonstrated, by their possessory actions with regard to their properties, a genuine and mutual recognition and acquiescence in the agreed upon and mutually adopted common

boundary between their properties for more than ten (10) years prior to the commencement of this action.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. That Plaintiffs' title to the Disputed Property be established and quieted in them, terminating any inconsistent claim of Defendant, and ordering the removal of any encroaching structures, landscaping, or other barriers by Defendants at their cost;

2. For injunctive relief ordering Defendant to remove any fences, landscaping, improvements, barriers or other structures they erect or install on the Disputed Property;

3. For injunctive relief pursuant to RCW 7.40.030 ordering the abatement and removal of any fences, landscaping, improvements, barriers or other structures they install, from the Disputed Property;

4. That Defendant be forever barred from having or asserting any right, title, estate, lien, or interest in or to the Disputed Property, and that the Court award in equity to Plaintiffs the cost of returning the Disputed Property to its status quo ante;

5. An order reforming the above-referenced legal descriptions of Plaintiffs' and Defendant's properties to correct and clarify the ownership of the Disputed Property; and

6. That Plaintiffs be awarded their costs, attorney fees, disbursements, and all other and further relief as the Court deems just and equitable.

Dated this 4th day of March 2015.

MILLS MEYERS SWARTLING P.S.
Attorneys for Plaintiffs

By: Scott M. Ellerby
WSBA No. 16277
Janna J. Annest
WSBA No. 34378

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife, Plaintiffs, v. UPPER SKAGIT INDIAN TRIBE, Defendant.	NO. 15-2-00334-1 DECLARATION OF SHARLINE LUNDGREN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Sharline Lundgren declare as follows:

I. I am one of the plaintiffs in this lawsuit. I am above the age of majority, am competent to testify, and make this declaration based on personal knowledge.

2. The property that my husband and I claim in this quiet title action consists of a strip of land spanning the width of Government Lot 1, on which Defendant Upper Skagit Indian Tribe (the "Tribe") is the record title holder, and described on Exhibit A. It is also shown on the survey map prepared on September 2, 2014 by professional land surveyor Peter Brands of Pacific Surveying & Engineering Inc. in Bellingham, Washington, a copy of which is attached as Exhibit B. The disputed property is highlighted on the survey, which shows a "Barb Wire

Fence" 19' North of the common property line on the East end and 25' North of the common property line on the West end (the "Disputed Property"). My husband and I are the owners of the adjacent parcel immediately to the south of Defendant's parcel and legally described on attached Exhibit C.

3. My husband and I bought the 10 acres immediately south of the disputed fence line in 1981 and have occupied it and the Disputed Property continuously since that time. We and our extended family have, since 1947, maintained the barbed wire fence north of the surveyed property line between our property and the property now owned by the Tribe. Photos of the fence, attached as Exhibit D, show that the fence is well-maintained and standing. The photos show that the barbed wire, which is attached to a few cedar trees along its 1,306 feet length (the trees are standing on our side of the fence), has substantial tree growth over the wire that occurred over many decades.

4. The Tribe obtained the property described on Exhibit A in 2013 from the heirs of Annabell Brown, who received the property from her estate four months prior to the sale to Defendant. Annabell Brown had not occupied the property for many decades prior to her death, and her heirs had likewise not occupied it in the four months they owned it. Annabell Brown never disputed our ownership of the fence or the land south of the fence. She had timber cut on her property from time to time and always honored the fence line, cutting no trees on our side of the fence. Likewise, my family since 1947 only cut

trees on our side of the fence. My family consistently and continuously maintained the fence since 1947. Both Annabell Brown and my family relied on the fence as the boundary marker.

5. The survey described above was the first indication anyone in my extended family ever had that the fence line was not consistent with the legal description of our parcel and the parcel to the north. The survey was done after the Tribe purchased the property.

6. My husband has, since 1981, tended to the timber and cut firewood on our side of the fence each year. When windstorms knocked trees into the fence, Ray would cut up the wood and repair any damage to the fence. We also "parked out" the property on our side of the fence by culling dead trees, limbs and brush, and removing some timber. There was never any suggestion by Annabell Brown that she had any right to trees growing on our side of the fence. Likewise, when she had logging done on her property, the loggers never touched any of the trees on which barbed wire was attached, or any trees south of the fence. No one entered the property to the south of the fence without our permission. During the time my extended family has owned the property, 1947 to the present, no one owning property north of the fence has claimed ownership of the Disputed Property or attempted to enter it.

7. Attached hereto as Exhibit B is a copy of a letter dated September 18, 2014 from David Hawkins, Tribal Attorney. In his letter, Mr. Hawkins offers

permission from the Tribe to our continued possession of the Disputed Property, which permission can be revoked at any time, Neither I nor my husband requested any such permission. The Tribe has clearcut the property north of the fence line and stated to us their plans to clearcut the timber on our side of the fence. They had taken steps to achieve that clearcutting prior to our retaining legal counsel who commenced this lawsuit on our behalf. The Tribe has not rescinded its threat to recommence logging on its own timetable, to tear down our fence, and to continue with the installation of a new fence on the southerly boundary of the Disputed Property.

Signed under the penalty of perjury under the laws of the state of Washington this 26TH day of March 2015 in Bow, Washington.

s/ Sharline Lundgren
Sharline Lundgren

Exhibit D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife,	NO. 15-2-00334-1
Plaintiffs,	DECLARATION OF ROBERT THOMAS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
v.	
UPPER SKAGIT INDIAN TRIBE,	
Defendant.	

I, Robert Thomas declare as follows:

1. I am above the age of majority, am competent to testify, and make this declaration based on personal knowledge.

2. I have lived across Hobson Road from the Lundgrens since 1980.

3. I am familiar with the Lundgren fence separating their property from the parcel to the north now owned by the Upper Skagit Tribe. I know that the fence has remained in the same location since I have lived in the neighborhood, that the fence has never been moved, and that the fence has been treated by the Lundgrens and Annabell Brown, the prior owner of the north parcel, as the property line.

The fence is a typical barbed wire fence and kept in good condition.

4. I have knowledge of a large fir tree that blew over in a windstorm in the late 1990s. This fir tree was located very close to the fence on the south side. I recall that the Lundgrens had the tree milled into lumber and used it for their board fence along Hobson Road.

5. In 2003, I also watched Ray Lundgren cut another fir tree that was dying that was located very close to the fence on the Lundgren side. The Lundgrens had that tree cut into lumber and beams, which I used to build an outdoor kitchen for them in 2004.

6. I have also witnessed the Lundgrens cutting older trees for firewood and maintaining the fence line during the time I have lived on my property across Hobson Road.

Signed under the penalty of perjury under the laws of the state of Washington this 26 day of March 2015 in Bow, Washington.

s/ Robert Thomas
Robert Thomas

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband

Plaintiffs,

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

NO. 15-2-00334-1

DECLARATION OF PETER R. DWORKIN

I, PETER R. DWORKIN, do hereby declare and state as follows:

1. I am one of the attorneys of record for the Defendant in the above-captioned case, over 18 years of age and am competent to testify in this matter.

2. Attached as Exhibit A hereto is a true and correct copy of a Quit Claim Deed recorded on January 12, 1984 from Annabell Brown to David L. Brown, transferring a ¼ interest in what is now referred to in this case as the "Tribe's Property" Skagit County Parcel No. P33521. This document was downloaded from the Skagit County Auditor's Office via the internet.

3. Attached as Exhibit B hereto is a true and correct copy of Annabell Brown's death certificate as

filed in Whatcom County Superior Court (Probate) Cause No. 12-4-00362-2.

4. Attached as Exhibit C hereto is a true and correct copy of the Last Will and Testament of Annabell Brown, as filed in Whatcom County Superior Court (Probate) Cause No. 12-4-00362-2.

5. Attached as Exhibit D hereto is a true and correct copy of a Bargain and Sale Deed recorded on May 29, 2013, from the Estate of Annabell Brown to Paul S. Brown, Vivian Jennings, and Barbara Carrell, transferring the Estate of Annabell Brown's remaining ¾ interest in the subject Property. This document was downloaded from the Skagit County Auditor's Office via the internet.

6. Attached as Exhibit E hereto is a true and correct copy of a Statutory Warranty Deed recorded on September 26, 2013 from the Brown Family to the Upper Skagit Indian Tribe transferring the subject Property in fee to the Tribe.

7. Attached as Exhibit F hereto is a copy of a portion of the official Skagit County "iMap" available online, showing the Tribe's Property and the Plaintiffs' Property. The text boxes and arrows were added, but the remainder of the information on the map is from the Skagit County iMap website.

8. Attached as Exhibit G hereto is a true and correct printout from the Skagit County Aerial Map online archive available at http://www.skagitcounty.net/Maps/iMap/mapjs=buil

damap aerial, showing the properties at issue from an aerial photo taken in 2013. The yellow highlighting of the Tribe's parcel was generated by the website itself, indicating the approximate parcel boundaries for the Tribe's Property, Parcel No. P33521.

9. Attached as Exhibit H hereto is a true and correct computer screenshot from Mapquest, showing that the distance between the intersection of Bow Hill Road and SR 11 (Chuckanut Drive) and the intersection of Bow Hill Road and Hobson Road is 3.19 miles.

10. Attached as Exhibit I hereto are true and correct copies of several documents downloaded from the Skagit County Auditor's office relating to the Plaintiffs' Property, Parcel No. P33568:

a. Real Estate Contract from Donna Harem to Lundgren dated 1981;

b. Open Space Taxation Agreement No. 792550 from 1973;

c. County Assessor printouts for Parcel 33568 cross referencing Open Space Taxation Agreement No. 732550 and showing Market value of $119,900 minus market use adjustments of $118,400 and a net annual tax liability of $48.04 for the 9.88 acre Lundgren Property.

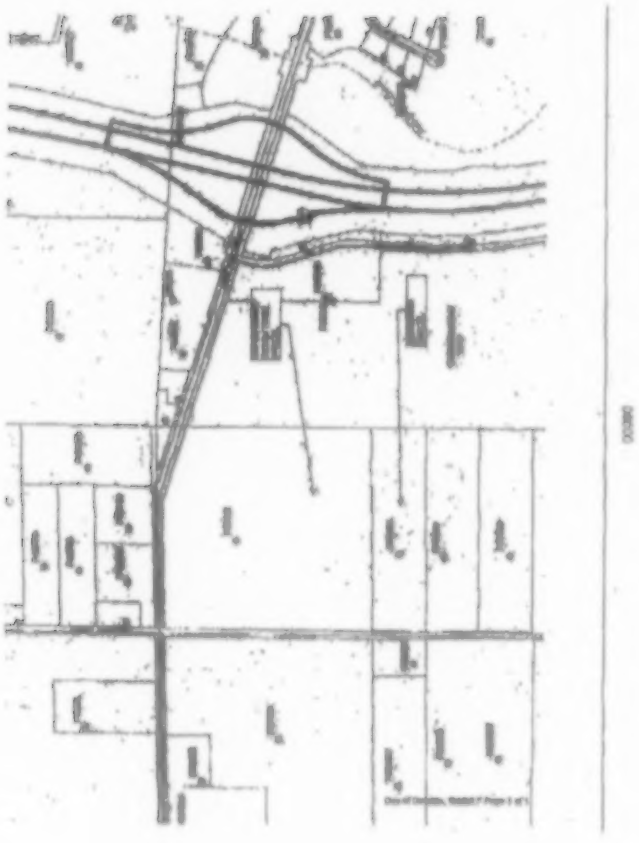
I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF

WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO BE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNED this 27th day of April 2015 at Bellingham, Washington.

s/ Peter R. Dworkin
PETER R. DWORKIN

EXHIBIT F



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband	NO. 15-2-00334-1
Plaintiffs,	DECLARATION OF PETER K. BRANDS

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

I, PETER K. BRANDS, do hereby declare and state as follows:

1. I am over 18 years of age, am competent to testify in this matter, and have personal knowledge of the facts set forth herein.

2. I am a Licensed and Registered Professional Land Surveyor in the State of Washington, License No. 35147 and have been since 1998. I am also a Principal of Pacific Survey & Engineering Services, Inc. ("PSE") and serve as the Survey Manager.

3. In my capacity as a land surveyor, I have surveyed and observed many fences and dealt with many boundary disputes.

4. I am familiar with the real property purchased by the Upper Skagit Indian Tribe from the Brown

family, bearing Skagit County Parcel No. P33521 ("the Tribe's Property") as well as the property to the south, owned by Plaintiffs.

5. Attached as Exhibit A to this Declaration is a drawing PSE staff created (including myself) from measurements and other data collected by PSE survey crews in the field.

6. This drawing accurately depicts the location of the deed line between the Tribe's Property and the Plaintiffs' Property as described in the Statutory Warranty deed issued to the Tribe, by the Brown family, recorded at Skagit County Auditor's File No. 201309260073, a copy of which is attached as Exhibit B hereto.

7. Plaintiffs Property, bearing Skagit County Parcel Number P33568, is located directly south of and abutting the Tribe's Property.

8. The drawing at Exhibit A accurately depicts the location of a barbed wire fence located on the Tribe's Property. The fence runs almost parallel to the southern deed line, but as noted on the drawing, it is located northerly of the deed line, ranging from approximately 42 feet north of the deed line on the west side, narrowing to approximately 19 feet north of the deed line on the east side

9. On the western side, the fence turns north near the right of way of Hobson Road, and continues to run north along the western property line of the Tribe's Property. At the southwest property corner, a

new gate and fence runs southerly along the right of way of Hobson Road.

10. I personally observed this fence in October 2012 and October 2013 when I was surveying the property, at the southeast and southwest angle points. The fence is a barbed wire fence, and is obviously old. I did not observe any areas that appeared to be recently replaced or repaired.

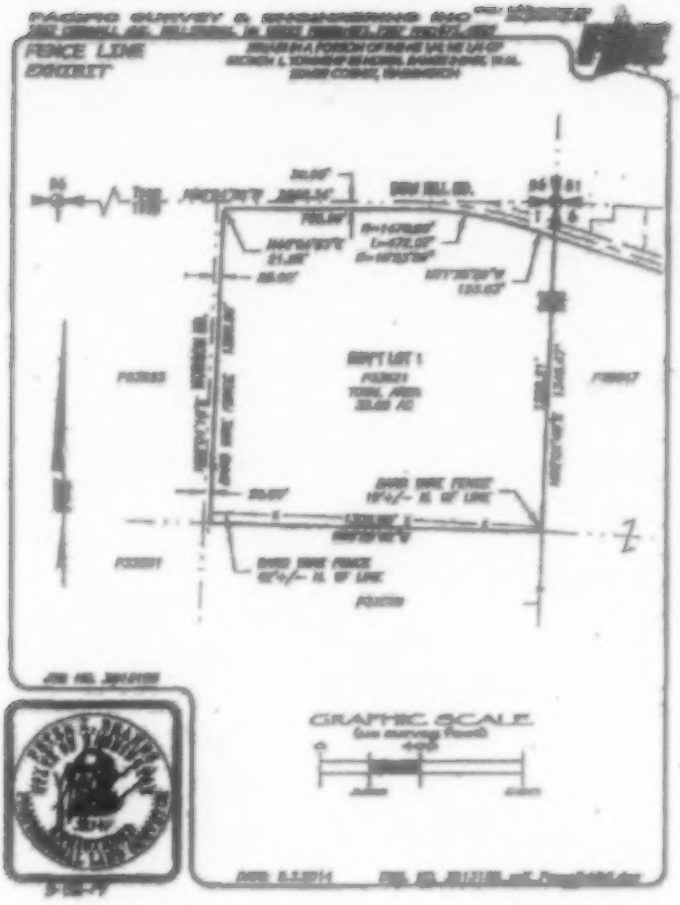
11. The fence that runs north-south along the western property line is connected to and of the same vintage as the fence running east-west along the southern deed line. From my observations, both the north-south fence and the east-west fence appear to have been installed at the same time.

12. Based upon my observations on site and my experience as a surveyor, I believe it is reasonable for me to infer from these facts that the fence line in dispute in this lawsuit was installed by the predecessors-in-interest of the Tribe's Property. This is my expert opinion only, and is not based on specific knowledge of who actually installed the fence.

I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO BE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNED this 27th day of April 2015 at Bellingham, Washington.

s/ Peter K. Brands
PETER K. BRANDS



Deed of Grants, Exhibit A Page 1 of 1

00106

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, wife and Husband

Plaintiffs,

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

NO. 15-2-00334-1

DECLARATION OF ROBERT A. HAYDEN

1. I am over the age of eighteen, competent to testify, and make the following declaration based on personal knowledge.

2. I have been employed by the Upper Skagit Indian Tribe since March of 2002 as "Project Manager".

3. I performed due diligence in investigating whether the Tribe desired to purchase the property at issue in this case. I was not informed about the fence at issue prior to purchase.

4. In October of 2013, I received a call from our surveyors, Pacific Survey & Engineering ("PSE"), who were surveying the property commonly known as government lot 1 (hereinafter "Subject Property"), in an effort to take the land into Trust. They informed

me that they had discovered a fence on the southern end of the Tribe's property.

5. After this call I went to walk the property and verified the existence of the fence, during my reconnaissance I notice approximately half way along the fence line, walking west to east, there was an access gate approximately 12 feet wide. A picture of which is attached hereto as Exhibit "A".

6. I could I could not tell who the owner of the fence was so I went to the neighboring land owners to the south, who I subsequently learned were the Lundgrens, to inquire as to whether they knew about the fence.

7. When I told them that there was a fence on the Tribe's property they informed me that it was their fence and asked if the Tribe would be willing to trade or sell that portion of the Tribe's property that the fence occupied (hereinafter "Disputed Property"). In stating this, they implied that they knew the Tribe owner the property on "their" side of the fence.

8. I told the Lundgrens that I did not know if the Tribe would be interested in selling the property on the other side of the fence. We made arrangements to tour a parcel of land that they wanted to potentially trade with the Tribe for the Disputed Property.

9. As best I can recall, the next day after Mr. Lundgren got the key for the gate to the potential property to be traded. Myself and Carl Smith met Mr. Lundgren at the potential trade parcel. It is located

directly north of the Subject Property on the other side of Bow Hill Road.

10. The potential trade property contained substantial low-lying critical areas and was of a very low value to the Tribe, from my perspective.

11. In discussing the value of the proposed property to be traded, Mr. Lundgren was of the opinion that the proposed property was worth more than the Disputed Property. However, Mr. Lundgren agreed that in order for him to obtain ownership of the Disputed Property, the Lundgrens were willing to give value for it.

12. The Tribe ultimately decided it was not interested in any proposed trade, and Mr. Lundgren was informed of this position. It was only after this point that the concept of adverse possession was ever brought up, as far as I am aware.

I SWEAR AND AFFIRM UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING JS TRUE AND CORRECT.

Dated this 27th day of April, 2015, at Sedro-Woolley, WA.

s/ Robert A. Hayden
Robert A. Hayden

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and
RAY LUNDGREN, wife and
Husband

Plaintiffs,

v.

Cause No.
15-2-00334-1

UPPER SKAGIT INDIAN TRIBE,

Defendant.

VERBATIM REPORT OF PROCEEDINGS

ORAL ARGUMENT
FRIDAY, APRIL 24, 2015

The Honorable David R. Needy
Department IV
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES

For the Plaintiffs: MILLS MEYERS SWARTLING
By Mr. Scott M. Ellerby
Attorney at Law

For the Defendant: Mr. David S. Hawkins
Tribal Attorney
Upper Skagit Indian Tribe

Reported by: Eileen Sterns, CCR, RMR-CRR
Official Court Reporter

FRIDAY, APRIL 24, 2015

[2] THE COURT: Good afternoon. Mr. Ellerby?

MR. ELLERBY: Yes.

THE COURT: And Mr. Hawkins?

MR. HAWKINS: Yes.

THE COURT: Great. I've reviewed the briefing. I'm not going to tell you I've read every word of every case in the notebook, but I certainly took a look of those and some other authority as well. So Mr. Hawkins, your motion to dismiss.

MR. HAWKINS: Thank you, your Honor. Your Honor, this Court has been moved to dismiss this action based upon sovereign immunity Rule 19, and the basic premise of "sovereign" is not subject to this Court 's jurisdiction, the ramifications therein.

The Court has been provided significant case law to support the authority that sovereigns are not subject to a court' s jurisdiction absent specific waiver by the Tribe or congressional approval of abrogation of Tribe sovereignty. That has not occurred here, and therefor e this Court lacks the fundamental need to adjudicate the basic premise here, which is a claim for adverse possession against the Tribe.

Further, Rule 19 precludes action from going [3] forward, as the Tribe is in fact a necessary party. A necessary party under Rule 19 says an absent party is necessary if adjudication of the party's interest may, as a practical matter, impair or impede his ability to protect that interest, or (b), leave any person or persons already subject to this -- substantial risk of incurring double, multiple, or other inconsistent obligations by reason of his claimed interest.

What that means, your Honor, is that if the Tribe has a legal interest that is impacted by these proceedings, and they cannot be joined, or if they have a legal interest, they are a necessary party. The legal interest here, obviously, is the property interest the Tribe purchased, and that property interest relates back to the original date of the registered title here, which is -- predates 1947, which is the date that plaintiffs assert their time of adverse possession initiated.

Once it's been established that a party is a necessary party, you have to then take a second step --

THE COURT: Stop there, and explain that process to me again. The Tribe's deeds predate '47?

MR. HAWKINS: So when you purchase a property interest via deed, you're purchasing the entire chain of title, that entire chain of title. Unless there are exceptions set forth in the deed, that entire chain of [4] title relates back to the original

registration of title. The original registration of title predates 1947 in this matter, so the Tribe's interest runs prior to 1947, because the bundle of rights which the Tribe is entitled to relates to the entire chain.

That's -- I will get to the significance of that later in terms of distinguishing this case from the *Smale* cases as a result of that division, but that is of import here because the claim for adverse possession and the notion that that claim arose prior to the Tribe purchasing its interest and therefore the Tribe has no interest is without merit, because we have the bundle of rights that the Tribe secured is the entire chain of title, not just when it came into title.

THE COURT: So any time someone, say, quiets title from adverse possession and then deeds the property to someone else, that would go back to the pre-adverse possession bundle of rights and affect -- in other words, are you saying you can never change what was once –

MR. HAWKINS: No, your Honor.

THE COURT: Okay.

MR. HAWKINS: As it relates to adverse possession, a claim for adverse possession, that title then would start at the date that the claimant met the requirements of adverse possession. So if a party secured [5] adverse possession in 1980, then their title would relate back to 1980.

THE COURT: Right. So you're not arguing that that would predate; you're just saying the bundle of rights here, you believe they predate '47, and the relevance is --

MR. HAWKINS: The relevance is that, unlike *Smale*, and unlike the *Quinault* case where those tribes took title with specific exceptions to the ongoing litigation, therefore they did not have a claim that related all the way back to the original registered title -- the Upper Skagit in fact are being dispossessed if adverse possession were pursued of a property interest here.

THE COURT: Okay.

MR. HAWKINS: I will go back to this -- the indispensable party test as a four-part test. The extent to which judgment rendered might be prejudicial to the absent party -- i.e., would the judgment here divest the Upper Skagit of the property interest, which is what we just discussed -- it's our position that because our bundle of rights relates back to the original date of registered title, if the adverse possession were to go forward and succeed, then Upper Skagit would be divested of its right here, so unquestionably it would impact our [6] interest.

Secondly, the request for injunctive relief here clearly impacts the Tribe's ability to take action necessary to move the property at issue into trust, requiring personal jurisdiction, but an injunctive -- an injunction necessarily relates to the party against

which the action is being taken. You can't escape that fact.

The second step is the extent to which judgment could be fashioned, narrowed to render the potential harm. Again, there's no alternative here. Either you make the decision that the court can go forward or you don't. There's no -- you know, there's no way to fashion a remedy here that would not limit the request -- requested by the plaintiffs here, to dispossess the Tribe of a property interest and to enjoin them from taking specific actions that relate to land at issue.

The third step, whether a judgment in the person's absence would be adequate, I just don't see how you could possibly have a judgment without the Tribe present, because you have to -- as case precedence has established, you have to establish the elements of adverse possession here before you can actually establish quiet title.

The cases are clear that it is a condition precedent, not something that automatically happens. You [7] have to come before the court and prove your case. So there's no way for you to not have the Tribe as a party pursuant to this -- to that step.

In terms of the alternatives to plaintiffs, alternative remedies to plaintiffs, we provided case law which clearly says that sovereign immunity supersedes the -- or overrides the notion that the plaintiff should have an alternative venue to seek relief. I think that's very clear in the *Clinton* case that

we've provided the Court, so that also weighs in favor of the Tribe.

I think the Tribe having met both 19A and 19B as a necessary and indispensable party precludes the action from going forward. Getting to kind of the heart of really what you were asking before, and the issues that plaintiff has raised, this whole notion of *in rem* jurisdiction is sufficient, that as long as the court has *in rem* jurisdiction, the court can go forward. The problem with that is that the case law doesn't in fact say *in rem* jurisdiction gives jurisdiction over the Tribe.

The case law that's been cited is very clear, in particular, I believe it's *Anderson* that says we're not deciding that jurisdiction resides over the Tribe; we're saying that jurisdiction over the Tribe is not necessary in this instance.

In the *Quinault* case you have the same [8] thing. You have the *Quinault* case, the court saying jurisdiction over the Tribe is not what's at issue here; it's a partition matter. It's not divesting the Tribe of an interest. The Tribe took their interest subject to this ongoing litigation; therefore, there's no interest that the Tribe has to protect, and they will not be impacted here, so we're not taking jurisdiction over the Tribe.

The *Smale* case, it's the same thing. The Tribe took their interest subject to the ongoing litigation. They did not have a legal interest to protect if adverse possession claim were to go forward.

Those cases have been overruled by the *Gorman* case. And the *Gorman* case is really quite specific. The *Gorman* case says a party has to go forward in the courts below and establish the elements as it relates to adverse possession. You can't merely say we've had this property for ten years, we've met the elements of adverse possession, and therefore we have title. There has to be a determination as to whether or not that's the case.

The RCW that's been cited clearly says that an action for quiet title requires the possessor, tenant in possession, to be present. The claim is one that is conditional. We cited specifically to the *Smale* case. It [9] says "if/then." If adverse possession is established, if adverse possession is established, how does one do that? One can only do that in a court of law before a fact finder while both parties are present to present their case.

Here, that's impossible, because this Court has no jurisdiction over the Tribe to bring the Tribe before the court. So as a matter of law, it is unquestionable, but that the Tribe, sovereign status precludes this Court from having subject matter jurisdiction, and it precludes this Court from joining the Tribe in order to adjudicate the merits of the claim.

THE COURT: And you're saying *Smale* -- I don't know if it's "SMAYLES" or "SMAHL" or whatever.

MR. HAWKINS: Yes.

THE COURT: Are you saying that there was a legal ruling of adverse possession prior to transfer of title?

MR. HAWKINS: There was a summary judgment action which the Smales -- I'm sorry, the Smales lost the summary judgment action below, your Honor.

THE COURT: Right. But the adverse possession, was it decided before the action started? Or wasn't it an adverse possession action?

MR. HAWKINS: It was an adverse possession [10] action that was taken by the prior landowner, to which the Tribe purchased the property subject to.

THE COURT: You're saying that was all established before the Tribe ever purchased the property.

MR. HAWKINS: The action was initiated before the Tribe came into title, yes. And the Tribe came into title subject to that action.

THE COURT: And here it is, the action.

MR. HAWKINS: Exactly. Exactly.

THE COURT: Okay.

MR. HAWKINS: Your Honor, I would like to reserve a few minutes to respond.

THE COURT: This is --

MR. HAWKINS: This is nothing -- okay.

THE COURT: What I'm saying, this is my afternoon, so I'm not going to cut off everyone for thirty seconds or a minute or two, and I will both give you both a chance to respond within reason.

MR. HAWKINS: All right.

THE COURT: All right. Mr. Ellerby.

MR. ELLERBY: Yes. Your Honor, I'm doing the briefing here, and listening to the argument, I feel like I've read the different cases, because they stand for almost exactly the opposite proposition for which the defendant has cited them here for. So I just have to say [11] that out loud.

I've never -- or rarely had to encounter such strained attempts to distinguish cases that are absolutely on nearly all fours with the current facts. In fact, it is rare to have a real estate case that has an appellate decision that's so close to the facts that we have here, and the facts that are different played absolutely no role in the *Smale* court's rationale.

So the plaintiffs and their family members have possessed this disputed property since 1947. My clients, the Lundgrens, have owned the property then since 1981. The Tribe obtained title in 2013 from the heirs of Annabell Brown, who only held title for four

months before conveying it to the Tribe, and then the Tribe had the property surveyed after they acquired it. And that was probably not terribly relevant here, but it was commented upon by the court in the *Anderson* and *Middleton Lumber Company vs. Quinault Nation*.

We filed a motion for summary judgment in this case on March 26th, and it's scheduled for hearing on May 7th. We, in our motion for summary judgment, dealt squarely head-on with the sovereign immunity Civil Rule 19 issue. The Tribe elected to bring this motion, which they're entitled to do. But I think that on a Civil Rule 12 motion to dismiss, the Court must assume the truth [12] of all the facts alleged in the complaint. So for purposes of this motion, the Court must assume that the Lundgrens can indeed establish adverse possess ion. I believe they've done so in their motion, and summary judgment that will be heard by the Court in another few weeks.

Your Honor, sovereign immunity does not apply to this action, which is purely an *in rem* action. There's no question that in Washington State Superior Courts have subject matter jurisdiction under RCW 4.12.010 on all issues concerning title to real property, so subject matter jurisdiction I don't think is controversial.

But contrary to the defendant's arguments, no Washington court has ever ruled that sovereign immunity, in this state, bars an *in rem* action. In fact, the opposite is true. And in the *Anderson vs.* -- and

Middleton Lumber Company vs. Quinault Indian Nation case, the state Supreme Court squarely held that superior courts have jurisdiction over a Tribe in a purely *in rem* action, and the fact that the title was transferred to the Tribe with sovereign immunity was of no consequence in that case, your Honor.

I will even read you the language. It says it is not disputed that the trial court had proper [13] jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property, or the *res*, *in rem*. Because the *res*, or property, is alienable and encumberable under a federally-issued fee patent, it should be subject to a state court *in rem* action, which does nothing more than divide it among its legal owners according to their relative interests.

That case is just indistinguishable from this case. You know, the issue about when title was transferred either before the action was stated or after the action was started played no role on the *Anderson* analysis on *in rem* jurisdiction. It played no role in the *Smale* court decision.

When you have an adverse possess ion claim, your Honor, the case law is quite clear that title ripens into original title at the conclusion of the ten-year possessory period, assuming that you can show all the other elements of hostility and so forth. Then you have actual title that you can convey to a buyer.

THE COURT: Short of a legal ruling?

MR. ELLERBY: Yes.

[14] THE COURT: Or an order.

MR. ELLERBY: I think we cited the *El Cerrito* case *vs. Rendale*, which is the person who develops original title -- it's not record title; it is original title -- can convey that interest prior to any judicial ruling that establishes adverse possession.

I thought I should also try to clear up one other thing. There seems to be an effort to draw some distinction between adverse possession and quiet title. Adverse possession is the claim. Quiet title is the relief. We're seeking quiet title here rather than ejectment because the defendant is not in possession of the property. So it's probably a distinct ion without a difference here, but I thought I should make that clear.

So I talked about *El Cerrito*. Here, your Honor, under *El Cerrito*, under *Smale*, under *Anderson*, the defendant never owned the property in question because original title was invested -- was vested in the plaintiffs decades before the defendant ever obtained statutory warranty deed to the property.

They make the argument that their title, their statutory warranty deed had no exceptions, and that's used as an attempt to distinguish the *Smale* case. But again, your Honor, whether or not their title had any

exceptions, and it is beside the point, it's not important [15] in the analysis of whether there's an adverse possession claim. They may have a claim against their seller to say, hey, you sold me a legal description that you actually didn't own the entire description. That doesn't affect my client. That doesn't affect this lawsuit.

In the *Smale vs. Nortep and Stillaguamish Tribe*, Division I reviewed a decision by the Snohomish County Superior Court that it -- holding that it had *in rem* jurisdiction in a quiet title case against the Stillaguamish Tribe. Division I squarely and unambiguously held that the Superior Court has *in rem* jurisdiction regardless of sovereign immunity and regardless of the fact that the Tribe acquired title after the adverse possession had matured. The case is not distinguishable on any grounds that make a difference here.

We cited the U.S. Supreme Court case, *County of Yakima vs. Yakima Indian Nation*, and the Supreme Court held there that courts in this state have *in rem* jurisdiction to enforce property taxes based on the alienability of allotted lands and not on the basis of *in personam* jurisdiction over the Tribe or tribal members.

So there, that *County of Yakima* case involved tribal lands, allotted lands, and this Superior Court was ruled to have authority to enforce property [16] taxes on allotted tribal lands. Here, we're not even talking about tribal land; we're talking about privately held property that was conveyed to the

Tribe. So this is a much stronger case for *in rem* jurisdiction than even existed in the *County of Yakima* case.

The argument that Civil Rule 19 prevents this case from going forward, it's a circular argument. I mean, *Smale*, *Anderson*, and other cases have held there's *in rem* jurisdiction, and have held that because it's *in rem* jurisdiction, sovereign immunity is not a bar to the court's jurisdiction.

So if sovereign immunity is not a bar to the court's jurisdiction, then it follows necessarily that Civil Rule 19 does not make the Tribe either a necessary -- well, does not make the Tribe an indispensable party with whom the case can't go forward; the case can go forward, because the Washington Superior Court and Division I in *Smale* have held that it can go forward with the Tribe as a defendant, because the Tribe is claiming an interest in this property.

We cited *Wright* and *Miller*, that recognized kind of federal law, where it's been held routinely that *in rem* proceedings are appropriate as an alternative, where jurisdiction over a party with a claim to property cannot be secured.

[17] And the U.S. Supreme Court has recognized that in bankruptcy cases, bankruptcy court orders can bind states where they couldn't otherwise get jurisdiction over the states, but because bankruptcy courts have *in rem* jurisdiction over the

property of the bankruptcy estate, they have the ability to make rulings that prejudice states.

I wanted to talk briefly about the *Gorman vs. City of Woodinville* case. I think that case stands squarely in favor of our position here. It's also been cited by the defendant for reasons that I don't understand.

In *Gorman*, the court, the state Supreme Court held that the city's immunity to suit in adverse possession claims didn't apply, because the adverse possession title ripened, became original title, not record title, but original title, before conveyance to the city. And the court went on to rule that the grantor could convey to the city only the interest that the granter owned. So in the *Gorman* case, as in this case, adverse possession applies because title was acquired against a private individual, not a Tribe or a city.

And here, my clients and their predecessor, family members who owned title before them, acquired adverse possession title decades ago against the Annabell [18] Brown owners, not the Tribe. So the Tribe has no -- no defense based on sovereign immunity.

THE COURT: Is your position that in *Smales* there was an actual legal ruling of adverse possession prior to the transaction?

MR. ELLERBY: No, there was not, your Honor.

THE COURT: So the word "ripened" is the same --

MR. ELLERBY: Yeah.

THE COURT: But you say there was.

MR. HAWKINS: Let me see, your Honor. I have the case here. It was my understanding that there was a summary judgment motion that the defense lost.

THE COURT: But that would have meant the action was --

MR. ELLERBY: Yeah, I mean, there was an argument that was an attempt to distinguish *Smales*, saying -- the court in *Smales* said, you know, that the case had to go back for the plaintiff to establish adverse possession, and therefore this case can't go forward, because we can't proceed in our adverse -- it doesn't make any sense, your Honor.

We're not saying that a ruling today ends the case, unless of course the court were to rule against us. But a ruling today just means that we've got to go [19] forward on the merits, and *Smale* and *Anderson* and other cases say we can do that. Because it's an *in rem* case, we can establish that we had a property interest that predates the Tribe's interest.

Let's see, what was I going to -- I think that if the Court, you know, contemplates the implications of a ruling upholding the defendant's argument here,

you know, the practical implication would be that an Indian Tribe in this state could claim any piece of real estate that it wants, and the owner of that real estate would be powerless to seek relief in superior court. That cannot be the law, and it's clearly not the law under all the authority that we've cited to you. The Lundgren s have established property rights attained via adverse possession, that doesn't -- and they' re not deprived of their right to seek relief in this Court.

There was another argument made by the defendant that seeking injunctive relief would require *in personam* jurisdiction over the defendant, but that argument suffers from the defect of having no citations to supporting authority. If the Court has *in rem* jurisdiction, the Court has, in its broad, implied powers, the power to enforce its rulings, and that would include enjoining parties from violating the court' s ruling. So there was -- there were no cases supporting that argument [20] cited, and I will move on.

Finally, I'm not sure if there is still a request, but in the motion there was a request that the Court stay its ruling in the event of a ruling against the defendant. But I think that there has been no showing that this case would be appropriate for interlocutory review, which is disfavored and rarely granted. They would have to show that there was obvious or probable error, that the Court departed from an accepted and usual course of judicial proceedings, or that this Court certifies that, that this matter involves a controlling question of law as to which there is substantial ground for difference of

opinion. I don't think there's substantial ground for difference of opinion here, when we have case law that is so on point that is dispositive of this issue. And even if there were, the Tribal Court retains full authority to act until review is grant, so that request should be denied.

Finally, your Honor, I still don't really understand the argument that the Tribe has a bundle of rights that go back to title, original title in 1947. That's not Washington law. The Tribe receives whatever interest its seller could convey to it, and it's as simple as that. They don't somehow go back to rights that existed prior to their seller. And here we have -- the [21] Court has to assume the truth of our complaint, the truth of all the facts asserted, and those facts are that the seller could not sell to the Tribe rights that had been lost through adverse possession decades ago.

So your Honor, I think that I've probably become repetitive, so I will stop there, and I appreciate your close attention. Thank you.

THE COURT: Mr. Hawkins, any rebuttal?

MR. HAWKINS: Yes, your Honor, thank you. To be clear, the cases that are cited to allegedly submit the Tribe or Tribes to the jurisdiction of Superior Court they do not state that Tribes are subject to jurisdiction of the court. What they say is that because the actions are *in rem*, the jurisdiction over the Tribe was not necessary.

The *Anderson* case is very specific in the language that it provides. As sovereign entity, Indian Tribes are immune from suit in state or federal courts. It is well settled that a waiver of their sovereign immunity will not be implied, but must be unequivocally expressed. Because our decision is based upon *in rem* jurisdiction, we need not further consider *in personam* jurisdiction, immunity, and waiver.

There is not one case that has addressed the issue of whether or not a Tribe is subject to personal [2.2] jurisdiction, subject matter jurisdiction in an adverse possession case.

THE COURT: Well, are you suggesting this Court does not have jurisdiction over the real property?

MR. HAWKINS: I am not suggesting that, your Honor.

THE COURT: All right.

MR. HAWKINS: It is recognized that you have jurisdiction. The state has -- definitely the state has authority over the property that is within its exterior boundaries. However, the issue was not whether or not that jurisdiction applies; the issue was whether or not the relief sought requires additional jurisdiction. And it does.

The plaintiff has to establish -- has to establish adverse possession, that they've met the elements of

adverse possession. And how do they do that? They have to come before this Court.

Gorman has nine cites where it provides for that. I can provide them for the court. I've highlighted them. It is conditional.

We affirm the Court of Appeals remand for trial to determine the validity of James German's claim of title. Gorman filed an action to quiet title claiming he acquired Tract Y. Title vests automatically in the [23] adverse possessor if all of the elements are fulfilled. This granter could convey to the City whatever interest he had only at the time of dedication. If the dedicator's title had been extinguished by adverse possession. Title to the property vested in German's favor if, as the complaint asserts, he fulfilled all the requirements of adverse possession.

Therefore, if *Gorman* had title to Tract Y through adverse possession, his title was not extinguished through the previous owner's attempt to dedicate the land to the City. If claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possession is automatically vested.

He has to prove adverse possession.

THE COURT: All of these cases are then going down that road to quiet title and see if adverse possession is met or not. You' re trying to stop it before it goes.

MR. HAWKINS: What I'm suggesting is that -- may I present this to you, your Honor?

THE COURT: Yes, thank you. I don't have any dispute with what you just read, and it's exactly on point with the facts we have here.

MR. HAWKINS: But -- and how are you to proceed when you can't join the Tribe? How will the Court [24] proceed if they cannot bring the Tribe to the case?

THE COURT: And in *Smales*, did they have any such problem, when the Stillaguamish Tribe was named?

MR. HAWKINS: The Tribe didn't raise Rule 19, your Honor. The Tribe did not raise this legal issue. They simply relied on subject matter jurisdiction. They did not raise Rule 19, and that is a significant issue here.

THE COURT: Okay. I think I see your attempt at distinction, but I -- because the Court has jurisdiction over the land, *in rem*, we all agree with that, and the cases say that sovereign immunity is not a basis to deny the *in rem* jurisdiction, at that point it seems to me that the Tribe has a choice, to participate or not, but this Court does not need jurisdiction *in personam* over the Tribe in order to decide the outcome of the disputed land.

MR. HAWKINS: How would you -- how would you be able to get the necessary facts in order to determine that, if the Tribe wasn't a party?

THE COURT: In most of the Rule 19 cases, it's a situation where someone is left out, in other words, they didn't get notice, they weren't included in the process. And the courts have said, you know, usually, that that is not fair, everyone should have a right to [25] participate.

There's no doubt here that the Tribe is on notice, and should they wish not to participate, or claim that because of lack of jurisdiction they're not participating, you're basically going back to the argument that the Court can never do anything with land if the Tribe chooses not to engage in the litigation.

MR. HAWKINS: Your Honor, you are absolutely on point as it relates to individuals. There's no question about that. But as it relates to a federally recognized Indian Tribe, their sovereign immunity is different. It is different from foreign nations. It is different from states. It is unique. And the rationale for that is because United States have recognized that Tribes' interests in protecting its sovereign status and the action that it takes from –

THE COURT: I know all that.

MR. HAWKINS: Okay.

THE COURT: But this property is in dispute. You're saying it's the Tribe's, you can't do anything, Superior Court in the State of Washington, because we're here now, you can't join us, we're barring you from joining us, and therefore the property must be ours.

MR. HAWKINS: Your Honor, I'm not saying that. That's what the case law says.

[26] THE COURT: Well, I don't read that in any case I've read, in any of these.

MR. HAWKINS: And *Clinton* and *Babbitt*, it is very clear in that situation.

THE COURT: So everyone time a Tribe makes a claim, they automatically win and there can be no litigation.

MR. HAWKINS: No. The Tribe, if it's making a claim, has to come before the appropriate tribunal and prove its case.

THE COURT: Right.

MR. HAWKINS: The Tribe has to -- cannot take action that's adverse to its Constitution or the Constitution of the United States. But the Constitution of the United States allowed the United States to treaty with the Tribes, which they did. And they gave the Tribes sovereign immunity pursuant to that process, and the significance of that should not be overlooked here. And that's what we're requesting.

THE COURT: I have a piece of land -- well, and I haven't heard you dispute that the fence went up in 1947 and has been up ever since, continuously. I know that's merits of something we may or may not get to down the road.

MR. HAWKINS: Yes, your Honor.

[27] THE COURT: But I heard you deny on a factual basis, so what I read from these cases is the word "ripen," not a new deed, but "ripen," adverse possession is potentially ripened at that point. In my mind, we still need to go the next step and actually have the court process to determine if all the elements have been met.

But what you're saying is, despite the appearance that it's ripened, and that Ms. Brown, when she conveyed title to the Tribe, didn't have that land to convey, that there is no way anyone can dispute that because of sovereign immunity.

MR. HAWKINS: Your Honor, what I'm -- what I'm referring to is the significance that all of the federal court law and the Washington state court law has placed upon sovereign immunity and the implications therein. And while you are correct, we have not submitted any factual evidence as it relates to the claim, have not done that because we have wanted to make it absolutely clear that the Tribe is not acquiescing to the jurisdiction as it relates to the factual claims here.

I have two declarations right here that dispute substantial facts that are not issue, so there is -- although it's probably inappropriate to get into that now, I can absolutely assure this Court that the Tribe has evidence which, if it will be forced to go [28] forward with, can present to this Court, disputing the claims that adverse possession has been met here. But that's not the issue.

THE COURT: I understand.

MR. HAWKINS: The issue is whether or not the Tribe is subject to the jurisdiction of this Court under the existing case law when there is a dispute. Rule 19 was not raised in *Quinault*. Rule 19 was not raised in *Smale*. Rule 19 was raised in the *Comenout* case, where the court held that when a party was seeking injunctive relief trying to enforce a lease against a federally recognized Indian Tribe, that that party could not do that, and it specifically addressed your concern.

THE COURT: I don't think we have a dispute about that, injunctive relief versus the title settlement.

MR. HAWKINS: And the underlying claim of request for injunctive relief, your Honor, the complaint includes that.

THE COURT: I understand. But that's, again, on the merits. The question today is dismissal based on lack of jurisdiction, and whether the court's jurisdiction over the property is sufficient or not.

MR. HAWKINS: But he's not just asking for jurisdiction over the property. The injunctive relief necessarily requires injunction -- jurisdiction over the [29] person.

THE COURT: Right. Well, we're not quite here is what I'm saying, on the merits. And I don't know, Mr. Ellerby, if you want to address that, or if we' re getting too far ahead of ourselves.

MR. ELLERBY: I think we' re --

MR. HAWKINS: Your Honor, if I may --

THE COURT: Sure, go right ahead.

MR. HAWKINS: I just want to be sure that the briefing as it relates to our request, if our motion is denied, we would assert that we have presented you with sufficient briefing as it relates to the right to take jurisdiction subject matter and Rule 19 up. That is a -- that is, a jurisdiction is a fundamental requirement this Court has to have before it can settle any disputes, and to waste the time of the Court and the resources of the Court in a proceeding that would impact the rights of the party, before that is established --

THE COURT: And you don't believe that my ruling has to be dispositive of the case in order for that to be granted?

MR. HAWKINS: I believe that a ruling on jurisdiction is dispositive on the case.

THE COURT: But ...

MR. HAWKINS: And although your ruling, if [30] it was against us, would not be, should we take it up to the appellate level or Supreme Court level and succeed, it would be.

THE COURT: That's not my question. My ruling doesn't have to be dispositive; just that there is some potential ruling that if granted either way, would be dispositive? I don't read the rule that way. That's why I'm asking. Because I agree that if I were granting summary judgment, clearly dispositive ruling –

MR. HAWKINS: Sure.

THE COURT: And then you would be entitled to the stay.

MR. HAWKINS: No, you are correct.

THE COURT: If my ruling goes against it, it would just keep this case moving forward.

MR. HAWKINS: Your Honor, I understand.

THE COURT: Okay.

MR. HAWKINS: I understand.

THE COURT: But I'm not going to tell you I have a lot of experience with Rule 19 in these cases.

MR. HAWKINS: Again, I would emphasize that the distinction between the other case is significant, because 19 wasn't raised. If you're going to go forward on the merits, you would have to have the Tribe as a party. The notion that the Tribe could appear is [31] basically like telling the defendant not to use its best defenses and just come before the court.

Why should you give up the right -- why should the Tribe give up a right it has in these proceedings just because it could? That doesn't make any sense, and it denigrates the importance of sovereign immunity and the basis for it.

THE COURT: I understand that that is sort of the flip leverage, but if the Court is saying the Court has jurisdiction over the property, and I would very much like everyone who believes they have some claim in that to participate, versus the remedy that' s being sought is dismissing outright because a sovereign immunity body has a claim in the litigation, therefore everyone else is barred from being heard, also strikes me as contrary to the case law that I'm reading.

But I'm probably tipping my hand a little bit, but I will find, obviously, that from the facts before re this Court at this point in time, I find no distinction between the *Smales* case on the underlying facts of the property, the length of time, the at least preliminary indications that there is a valid

argument for adverse possession, that under those indications, because there's been no formal litigation, Ms. Brown could only transfer whatever she had to transfer to the Tribe, and [32] that if adverse possession did in fact occur, it occurred well before the Tribe became -- received this property from Ms. Brown.

I don't find that these cases, with us, Superior Court of the State of Washington, having *in rem* jurisdiction, bar further litigation regarding the title to the disputed property with the adverse possession.

In terms of Rule 19, I'm simply, while I understand your argument, I am not reading that as broadly as you are in terms of the Tribe's ability to participate or their -- the Court could not join the Tribe against its will. I understand that. But it seems to me that the Tribe is the one saying that this property, which by its appearance may be adversely possessed long before the Tribe came into it, is asking to bar litigation for the other side rather than the other way around, if I'm making myself at all clear, and I find that contrary to common sense, fairness, and due process for all involved.

I don't by that mean to indicate that I can or should or would enforce the Tribe to participate in any litigation, and I certainly agree, I do not have *in personam* jurisdiction over the Upper Skagit Tribe.

So I will deny the motion to dismiss. I will find that in my opinion, that motion is not dispositive of the case, but if there are any findings I [33] can make,

Mr. Hawkins, that you would like to seek emergency review for the sake of judicial economy and energy and effort and expense of the parties, to have this decision reviewed prior to further litigation at this level, I'm not opposed to that happening, but I don't think that becomes automatic in my ruling.

MR. HAWKINS: Thank you, your Honor, for the opportunity.

THE COURT: Thank you.

MR. ELLERBY: Your Honor, I do have an order.

(COUNSEL CONFER.)

THE COURT: You did not sign?

MR. HAWKINS: I did not, your Honor --

THE COURT: I never force anyone to. I guess in your -- to protect your position completely, you're not here.

MR. HAWKINS: Okay.

THE COURT: But if you wanted to, I just want to make sure you had the opportunity.

MR. HAWKINS: No, I appreciate that, your Honor.

THE COURT: Thank you. Very interesting issues, gentlemen. Thank you both.

Note for Motion Calendar:
Friday, April 24, 2015 at 1:30 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

SHARLINE LUNDGREN and RAY LUNDGREN, husband and wife,

Plaintiffs,

v.

UPPER SKAGIT INDIAN TRIBE,

Defendant.

NO.: 15-2-00334-1

ORDER DENYING DEFENDANT'S MOTION TO DISMISS ~~[PROPOSED]~~

THIS MATTER came before the Court on Defendant Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review. The Court has considered the files and pleadings herein, including, without limitation, the following:

1. Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

2. Declaration of David S. Hawkins in Support of Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review with Exhibit;

3. Plaintiffs' Opposition to Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review;

4. The Declarations of Sharline Lundgren, Earline Swanson, Ray Brown and Robert Thomas filed in Support of Plaintiff's Motion for Summary Judgment; and

5. Reply, if any.

It is hereby ORDERED that Upper Skagit Indian Tribe's Motion to Dismiss for Injunctive Relief and Underlying Complaint and in the Alternative to Stay These Proceedings Pending Appellate Review is DENIED.

DATED this 24th day of April, 2015.

DAVE NEEDY
Judge

Skagit County
Superior Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

Sharline Lundgren, et al.,	Skagit County Cause No.
Plaintiffs,	15-2-00334-1

vs.

Upper Skagit Indian Tribe,

Defendant.

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE SUSAN K. COOK
Department III
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

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DATE: May 7, 2015

REPORTED BY: JENNIFER CHRISTINE POLLINO, RPR, WA, CCR #2221, CA CCR #10176 OFFICIAL REPORTER

MOUNT VERNON, WASHINGTON
MA7 7, 2015
10:15 A.M.

[2] THE COURT: Alright. This brings us to the most interesting case on the calendar. Sorry. No offense to anybody. Lundgren versus Upper Skagit Indian Tribe.

MR. ELLERBY: Good morning, Your Honor. I'm Scott Ellerby on behalf of Plaintiffs, Sharline and Ray Lundgren. My client, Sharline Lundgren is here with me in the courtroom today.

THE COURT: Good morning.

MR. HAWKINS: Good morning, Your Honor. David Hawkins on behalf of Upper Skagit.

THE COURT: Good morning. Alright. So what we have here is a longstanding fence.

MR. ELLERBY: Yes, indeed. And, Your Honor, just to comment first on that procedural posture, our motion for summary judgment also included argument regarding the jurisdictional

defense. The jurisdictional defense was heard by Judge Needy a week or two ago and ruled on.

THE COURT: God bless him for taking that off my plate. Let's move to the much more interesting issue.

MR. ELLERBY: Okay. So this is an adverse [3] possession, mutual recognition and acquiescence case with two separate claims. We've cited to the Court case law that establishes that summary judgment is available on these claims like it's available on any other civil claim. There's no different standard.

We've come forward, Your Honor, with, I think, a pretty overwhelming case developing facts that more than sufficiently satisfy all of the elements of both of these claims. The burden then, of course, shifts to the non-moving party to come forward with specific facts, rebutting the moving party's facts that do support the elements of the claim. And the Courts will not allow the parties to rebut a showing necessary for summary judgment using speculation or argumentative assertions by factual issues.

So just very briefly on the facts, Your Honor. The Lundgren family has owned this property in question since 1947. There are no facts about who originally installed a fence. But the un rebutted facts are that this fence was in existence from the time the Lundgren family obtained the property in 1947 and has remained in this present location during that entire span of time.

My clients, Sharline and Ray Lundgren, obtained title to the northern acreage on their parcel from family members in 1981. By contrast the tribe obtained their adjacent parcel to the north of the Lundgren parcel in 2013 from the [4] heirs of Annabelle Brown.

The Annabelle Brown family had not occupied their property north of the fence line for many decades. And Annabelle Brown apparently quitclaimed a one quarter interest of her interest to her son, Mr. Brown and David Brown in 1984. And the remaining three quarters of interest in her property then was passed through her will to her other children; so they each owned one quarter. And then in 19 -- or excuse me -- in 2013 the three children conveyed title to the tribe. But the method of conveyance, whether it was by statutory warranty deed or quitclaim is not relevant to the issues before the Court today. The tribe may or may not have an issue with their sellers, but that's not before the Court.

So the elements of an adverse possession claim, Your Honor, are number one, exclusivity. Number two, actual and uninterrupted use. Number three, open and notorious use. And finally number four, hostility. The case law recognizes that there is a substantial overlap between those factors. I'll address the first factor exclusivity. The facts need not show that this use was absolutely exclusive. It only needs to be possession of the type that's expected of an owner under the circumstances. And the

circumstances depend on the nature and location of the property. Here, Your Honor, we're dealing with rural property. It's timbered [5] land. It's registered under agricultural registration. So the necessary use in that type of situation is different than the type of use that would be required for, you know, a developed residential neighborhood.

I think the important thing to consider here, Your Honor, is that there is absolutely no testimony before the Court that the Brown family has ever used the property to the south of this fence line. The record is devoid of any contention that there's been any use by the Brown family. On the contrary, the evidence is that the Lundgren family has indeed exclusively used this property for over 60 years since 1947. The only attempted fact that the tribe puts forward to create an issue of fact is the existence of a gate on that fence.

THE COURT: They give a big colored photograph of it, moss and all.

MR. ELLERBY: Right. But there's no testimony offered on the use of the gate, and it's, therefore, not material. It's speculative on whether or not that gate was ever used by the Brown family. It's tempting to respond to the, you know, the effort of the non-moving party created issues of fact about that. There are reasons for having a gate when you have, you know, farm animals. And sometimes farm animals get through the gate. But, again, we don't even need to go there because there's no testimony the Brown [6] family ever used the gate, ever used any of

the property south of this fence line. This is not a fence that would be difficult to see. It's a sturdy barbed wire fence. You've seen our photos showing that in addition to fence posts the barbed wire was also in certain locations where there were cedar trees. It was tacked to the cedar trees. And the cedar bark has grown over the barbed wire, which obviously takes many decades to happen. The consistent testimony from our witnesses is that this fence has been well maintained since 1940's.

The testimony of Ray Brown, who is the brother-in-law of Annabelle Brown is that Annabelle had workers cut timber on her side of the fence. In fact, Mr. Brown was even involved in cutting timber himself. She never cut timber south of the fence line. And the testimony is that the Lundgrens cut timber on their side of the fence, maintained the land, culled dead wood, and then maintained a fence. There's no testimony from the Brown family that they maintained the fence. However, if they had testified to that it, frankly, wouldn't interfere with a finding consistent with adverse possession because it would show that both property owners recognize the fence as a boundary fence.

So then moving on to the next element of actual and uninterrupted use. The defendant hasn't even challenged the existence or the elements. And we've cited case law saying [7] a showing of actual and uninterrupted use, you know, overlaps with the other elements exclusivity and open and notorious use.

So I'll move on to the open and notorious use. That element requires proof either that the true owner has actual notice of adverse use or that the claimants have used the land in a way that any reasonable person would assume or that the person to be -- the person using was the owner. And the use and occupancy need only be of a character that an owner would assert in view of the nature and location of the property. Here, again, we're dealing with rural land, timbered property. The Lundgren family has used it in a way consistent with the way owners of that type of property would use it.

The Defendant's assert that David Brown, who is the one quarter, who was the minority owner may not have had notice of this fence. And they assert that creates a material issue of fact. However, Your Honor, there's no evidence to refute the fact that the Brown and Lundgren families for generations have treated this fence as the boundary line. As I've pointed out, Ms. Brown never cut trees on the Lundgren side. Her brother-in-law, Ray Brown, confirmed that both families were aware of the fence all the way back to the 1940's. Mr. Ray Brown, a Brown family member observed the fence in the 1960's and 1980's. Then [8] the neighbor on the other side of Hobson Road, Robert Thomas, says he's lived there from the early 1980's that the fence has always been there, and was always treated by both the Lundgren family and the Brown family as the boundary line separating their properties.

So the element of open and notorious only means that the boundary must be visible and

discoverable. Washington law establishes that it doesn't have to be actually known by the record owner, in this case the Brown family. So David Brown's testimony that he wasn't aware of the fence is really not relevant. It's not material to the elements of adverse possession. Washington law establishes the true owner is charged with constructive notice of a boundary object that's visible and placed on the ground. And that's true even if it takes scrupulous examination or a professional survey to discover the demarcation object.

Finally, on adverse possession, Your Honor, the element of hostility, it sounds worse than it really is. Hostility is shown if the possessor treats the property like true owner would to the statutory 10-year period. Like the other elements, it depends on the nature and location of the land. The facts here I think absolutely demonstrate that the Lundgren family has acted like the true owners of this land since 1947.

There was an attempt to use the brand new Supreme [9] Court case of Gamboa to create an issue. Your Honor, Gamboa has no application to an adverse possession case, number one. It's a prescriptive easement case. Prescriptive easement cases are an entirely different animal. Number one, they don't deal with title. They deal with use of property. And the policy reasons to treat prescriptive easement claims differently are significant. In adverse possession cases, you know, the policy of Washington law is to, you know, reject stale claims and to promote the utilization of property. Those policy reasons don't exist in prescriptive easement cases.

Even if Gamboa applied, and this clearly does not. Gamboa only says that a presumption of neighborly sufferance arises only if there's a reasonable inference of neighborly sufferance or acquiescence necessary for that presumption to arise. And the cases that create a reasonable inference of neighborly sufferance deal with like a pathway created and used simultaneously by both neighbors. You have to have facts like that, and that just doesn't apply in an adverse possession case. And, moreover, even if Gamboa did apply there was no simultaneous neighborly use of this acreage. We cited to the Court the El Cerrito case, actually a couple of different propositions. But one of the propositions that it supports is the Court there held that the fact that neighbors were friendly and neighborly didn't [10] defeat an adverse possession claim. And, moreover, an offer by the adverse possessor party to the title owner to buy the disputed property didn't defeat hostility.

An interesting wrinkle of adverse possession cases, Your Honor, that I think is often misunderstood by parties is, and this was discussed in the El Cerrito case too, once you've established all four elements of adverse possession for a 10-year period Washington law recognizes that then there is ripe title on the side of the adverse possessor. And the adverse possessor can then just leave, go away, and can still, decades later establish their title under adverse possession. The record owner, the party who is being adversely possessed against must do

something to interrupt, to basically adversely possess the property back for ten years.

Well, here, Your Honor, the facts are that the Lundgren's family fence, whoever originally installed it, it's not relevant, has been there since 1947, used it openly and notoriously under a claim of right for ten years after 1947. So in 1957 adverse possession was established. Any evidence produced by the tribe in opposition to this motion at most goes back to the date when David Brown obtained his one quarter interest in the 1980's. They have no evidence to rebut the showing made here of the adverse possession for the many decades prior to that. And, therefore, as a matter [11] of law summary judgment is appropriate.

You know, I've already touched on the irrelevance of the negotiations. Number one, my clients dispute the testimony of the tribe's land agent, who testified there had been discussion about, you know, trading some other property. It wasn't necessary to respond to that because it's not a fact that the Court can even consider. It's not admissible under Evidence Rule 408 as an offer and settlement. El Cerrito held that an offer doesn't destroy the hostility element. And, moreover, under Washington law an adverse possessor's intent is not relevant. Their subjective intent is not relevant. So even if the adverse possessor is not sure whether they are dispossessing their neighbor it doesn't matter in Washington law. So an offer to buy the property also is irrelevant because it goes to the subjective intent.

All of the elements of adverse possession here, Your Honor, also support the claim of mutual recognition and acquiescence. The un rebutted evidence is that the Brown family and the Lundgren family recognize this fence line as the boundary separating their properties. All of their actions for many decades have been consistent with that, and it's been for well more than ten years. And so with that, Your Honor, I will end. And if there are any questions I would be happy to answer them.

[12] THE COURT: David Brown, the minority title holder, doesn't say that the fence wasn't there. He simply says he didn't know the fence was there.

MR. ELLERBY: That's correct. It's a little hard to believe that, Your Honor. He doesn't say how much time he ever spent on the property. I think you've seen the pictures of this fence. It's not something that anyone who was walking in that part of the property could miss.

THE COURT: Uh-huh.

MR. ELLERBY: And under Washington law whether or not Mr. Brown was aware of the fact is beside the point.

THE COURT: He doesn't say I went back there, and the fence wasn't there. He said I just didn't know it was there.

MR. ELLERBY: Yeah. Fences like this tend not to appear and disappear. So thank you.

THE COURT: Well, not when they are grown into a cedar tree.

Mr. Hawkins?

MR. HAWKINS: Thank you. The Plaintiffs in this matter have failed to meet their heavy burden of establishing that there are no material issues of fact before the Court. Plaintiffs carry the burden to prove all of the elements of adverse possession that they have laid forth, and they have failed to do so. There are significant [13] material issues that need to be addressed as they relate to each element.

When reviewing a motion for summary judgment the Court must consider all facts and reasonable inferences in the light most favorable to the non-moving party. Furthermore, where the material facts are based solely upon the moving party's summary judgment affidavit, as is the case here, credibility is especially important. In such a case, the non-moving party should have the opportunity to expose the moving party's demeanor while testifying at trial. The back and forth that you've just had, as it relates to the declaration of David L. Brown and the credibility of the statement that he has provided the tribe is exactly why the Court in Rodney v. Anders [ph] takes that position.

Adverse possession claims are latent with facts. It is significant for the trier of fact to have the opportunity to look at the witnesses and assess their demeanor in order to establish the reliability of the

statements that they are making. You have a number of contradictory statements here that relate to the elements. Those statements can only be determined as to their credibility, allowing this case to go forward to trial and permitting the tribe, should it elect to do so, engage in discovery and make inquiry as to the statements that have been made in support of each element herein, particularly as it relates to open and notorious.

[14] The requirement of open and notorious to satisfy that the title holder has actual notice of the adverse use throughout the statutory period. The acts showing such open and notorious use must be loud and clear with sufficient obtrusiveness that would be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention. Real property will only be taken away from the original owner by adverse possession when he was or should have been aware and informed that his interest was challenged. When you place that standard against the declaration of David Brown there is clearly an issue of fact that needs to be resolved.

Furthermore, when you put Mr. Brown's statement, David L. Brown's statement, in contrast to Ray Brown's statement, and Mr. Ray Brown's statement says: I am familiar with the fence that separated the two properties, and like everyone in the extended Brown family was aware of the boundary fence that was put in place in the 1940's and always treated it as the property line, a fact that they rely upon, that fact directly contradicts what David L.

Brown is saying. Therefore, discovery is needed. The credibility of both statements need to be assessed by this Court in order to determine which one the Court is going to rely upon in order to establish this claim of open and notorious.

[15] As it relates to use, not actual and uninterrupted, again, there are facts before this Court that need to be reviewed. What, in fact, was that fence used for? Was it permitted for the Browns to have access to both sides of the fence? Was it a fence installed by tribe successors in interest so that it would preclude animals from going over the line onto this portion of the land that they didn't want animals on? That's a reasonable inference. Under Riley, the standard when reviewing a summary judgment to consider all facts and reasonable inferences in the light most favorable to the nonmoving party. That's a reasonable interest in favor of the tribe as it relates to this element.

Next, as it relates to exclusivity. Possession must be of a type that would be of an owner under the circumstances. I completely agree with counsel for the plaintiffs as it relates to this El Cerritos case and the statement that the former owner intended to sell the property and how that does not apply in those circumstances. However, it does not speak to whether or not an individual making a claim for adverse possession is acting as an owner would act, a necessary element in this claim. And I do not believe that a party acting as an owner as soon as they receive notice that the tribe was asserting their property rights to the disputed property would make the

statement [16] that they understood this was not their property; that they wanted to trade for this property, and that they even took the steps of taking the tribe's agent to look at the property that they wanted to make a trade for.

Another material issue that needs to be reviewed and determined at trial, credibility. It's been contested. It's been contested by the plaintiffs that this ever occurred. Credibility, has to go to trial. Inferences under Wagg have to be read in the benefit of tribe in a summary judgment motion. They are relying upon to dispute this they are relying upon declarations. Under Riley it has to go to trial.

As it relates to hostility we do go back and rely upon the open lands doctrine. And the open lands doctrine simply does not permit this element to be met here. I'm sorry the vacant lands doctrine. It's permissive use among neighbors to residential property –

THE REPORTER: Mr. Hawkins, could you slow down for me please.

MR. HAWKINS: I'm sorry. In Gamoa the Court explains the vacant land doctrine and it's presumptive permissive use amongst neighbors to residential properties. The Court is expanding the vacant lands doctrine. In this the Court is starting to narrow the application of adverse possession. It's not going the other direction. In fact, [17] in the Gorman case, in the concurrent joined by a majority of the court said: As the facts of this case demonstrate it is

time to rethink the doctrine of adverse possession. Many of the beneficial purposes the doctrine is said to serve do not justify the doctrine in modern times. Moreover, the doctrine's basic premise is legalization of wrongful acquisition, acquisition of land by theft. Conduct is in our time. We can discourage not withstanding the possibility of putting land to a higher and better use.

Your Honor, there's been much discussion about this fence, and how long it's been there, and that it's obvious to everybody who has ever gone by it. But I will tell you I drove by this property before the tribe logged its portion of the property on the other side of the fence, and you could not from the road see this fence. It has been grown over by the trees as has been shown by these pictures. There was nothing to the common eye that you could observe. I understand this survey element and the authority cited by Plaintiffs here, but you have to take into consideration the land at issue, whether or not it's fair to allow an individual to have land that is vacant subject to a claim of adverse possession due to a hidden fence.

Finally, Your Honor, there is a question about what the fence was used for. Peter K. Brand, our surveyor, who went and did the survey, noted in his declaration that [18] the fence runs east and west with an access gate in it. Allowing or calling into question exclusivity. But then the fence turns to the north. If this, in fact, was a fence taken care of by the Lundgrens, used by Lundgrens, and a property line that the Lundgrens assert why didn't the Lundgrens

come forth and claim that portion of the fence that runs to the north? They didn't do that. This fence -- there's questions about whether or not this fence is a property line or not. All inferences have to be held in the light most favorable to the tribe when a claim for summary judgment is based solely on affidavit. The non-moving party should have the opportunity to expose the moving party's demeanor while testifying at trial.

Your Honor, we respectfully request that this motion be denied. And alternatively we would ask that this Court take into consideration the recent court ruling in Gorman, the findings. I would ask you to take note of the fact that in our motion to dismiss the Court held or found that it lacked personal jurisdiction with the tribe. That's significant. Because if we were going to move forward to trial the Court needs to have personal jurisdiction over the tribe. So alternatively understanding the factual disputes that are here we would ask the Court to act sue sponte and dismiss the underlying complaint. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hawkins.

[19] Mr. Ellerby?

MR. ELLERBY: I think I can be brief, Your Honor. I won't respond to the jurisdictional issues. I think that's law of the case already.

The quote that counsel read to you from the Gorman case was actually the dissent of the chief justice, and it was not part of the ruling of the Court.

The attempt to create an issue of fact over the surveyor's testimony that, you know, the fence curved around and then headed north again really is beside the fact. I mean here we have a case -- and I would say, Your Honor, I've been handing adverse possession cases for over 25 years, and this is the clearest most overwhelming set of facts that I've ever had to deal with. Because you have a fence that's obviously been there a long time, but well maintained. It spans the entire width of the property. So the fact that the fence either jogs up or jogs down on the other property line is not relevant. And, again, it doesn't matter. The only thing that the surveyor, Mr. Brand's testimony, might be able to be accepted for, it is speculative, but it might create the issue of who originally installed the fence, depending on, you know, if the fence jogs up or down. It doesn't matter. It doesn't matter who installed the fence.

You know, this insistence that the Lundgrens -- if you [20] assume the testimony of the property agent for the tribe that they offered to buy the property or trade other properties for it, again, that's not properly before the Court. And under Washington law it doesn't matter if the party is adversely possessing offers to buy the property from the record owner.

I would say their surveyor had no difficulty finding the fence. It's clearly demarcated on their

survey map. And so the testimony is un rebutted that the fence was open to view by all regardless of the testimony of counsel that when he drove by from the street he didn't notice it. That's not testimony that's properly before the Court anyway. So, Your Honor, with that I would ask that the Court grant summary judgment to the Lundgrens.

Your Honor, counsel points out that the quote that he read was from a concurrence. I misspoke. I thank you for pointing that out.

THE COURT: Mr. Ellerby, your motion is granted. I would have to agree with you this is as clear as a case as I've had on the bench as well.

This fence has obviously been here for a great deal longer than the necessary ten years. And the witnesses' declarations indicate that the use that the Lundgrens made of the property was a use that was the type of activity that an owner would make use of this type of property for. They [21] cut trees. They trimmed trees. They took wood from the area. They cut up trees that had fallen on the fence. They used the property as their own. And the evidence also is that Ms. Brown, when she owned the property, recognized the fence as the boundary line because she took timber from her side of the fence but did not go over on to the other side and take any timber from there. She recognized that fence as the boundary line.

And so the exclusivity element has been met. The open and notorious element has been met. This fence is not hidden. It's not something that you

couldn't find if you walked back there. And that's all that is required under the law. It has been well maintained. It's not fallen into rack and ruin or covered with blackberry brambles. It's right there for all to see. And the neighbors obviously, or at least the neighbor across the street, knew that it was there; that it has been actual and uninterrupted use for at least a period of ten years, and the use has been hostile as that word is defined by the law; that is that the Lundgrens treated it as their own.

The vacant lands doctrine doesn't really apply here nor does the Gamboa case. This is not a case of neighborly accommodation. I don't know if the case -- it's hard for me to imagine a case that would involve neighborly accommodation of a vacant land doctrine where there was a [22] fence of this duration. I don't think those doctrines apply here.

And, frankly, as Mr. Ellerby points out, it doesn't matter if Mr. Brown, David Brown, knew the fence was there or not. That's not the issue. He doesn't say that the fence wasn't there. And he doesn't say get around to the other side of the fence or that anybody in the family did. Nobody says they used the gate. There just isn't anything to create a legitimate issue of fact on any of these elements.

And even looking at the possibility of inferences in the light most favorable to the nonmoving party there just aren't any. There is nothing to indicate that the Browns ever crossed over from their side of the fence or that they believe that anything on the Lundgren's side of the fence belonged

to them. And the Lundgrens certainly acted as though that parcel of property did belong to them. So adverse possession has been established.

The doctrine of recognition and acquiescence also applies here. The line is certain, well defined as designated by the fence. There are manifestations of mutual recognition and acceptance of the true boundary line, given that the parties conducted themselves as though they owned the property on each side of the fence and no more. And it continued for ten years or more, a great deal more actually. [23] So the motion is granted.

MR. ELLERBY: Okay. Your Honor, I'll show a proposed order to Mr. Hawkins and hand that up to the Court.

MR. HAWKINS: Thank you, Your Honor.

THE COURT: Thank you, counsel.

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents.

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

Skagit County No. 15-2-00334-1

OPINION

Appeal from the Superior Court of the State of Washington for Skagit County. No. 15-2-00334 – Dave Needy and Susan Cook, *Judges.*

ARGUED JUNE 9, 2016
FILED FEBRUARY 16, 2017
AMENDED JUNE 8, 2017
RECONSIDERATION DENIED JUNE 12, 2017

Before: En Banc: JOHNSON (Opinion), OWENS, WIGGINS, GONZÁLEZ, YU, STEPHENS (Dissenting), McCloud, Fairhurst, and Madsen, *Supreme Court Justices.*

JOHNSON, J.

***861**¶1 This case involves the relationship between in rem jurisdiction, Superior Court Civil Rule (CR) 19, and sovereign immunity. The issue is

whether the Upper Skagit Indian Tribe's (Tribe) assertion of sovereign immunity requires dismissal of an in rem adverse possession action to quiet title to a disputed strip of land on the boundary of property purchased by the Tribe. The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. An inquiry under CR 19, as required by our cases, involves a merit-based determination that some interest will be adversely affected in the litigation. Where no interest is found to exist, especially in an in rem proceeding, nonjoinder presents no jurisdictional barriers. We find that the Tribe does not have an interest in the disputed property; therefore, the Tribe's sovereign immunity is no barrier here to this in rem proceeding. The trial court properly denied the Tribe's motion to **571 dismiss and granted summary judgment to the property owner. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sharline and Ray Lundgren and the Tribe own adjacent properties in Skagit County, Washington. A barbed wire fence runs along the southern portion of the Tribe's land. The fence spans the width of the Tribe's lot, with a gate approximately halfway along the fence line. The land between the fence and the southern boundary of the Tribe's *862 lot is the land at issue in this case. For ease of reference, we refer to this land as the "disputed property."

¶3 The Lundgrens bought the 10 acres of land immediately south of the disputed property in 1981.

The property had been in their extended family since 1947, when Sharline Lundgren's grandmother first bought the property. The Lundgrens established that the fence on the disputed property has been in the same location since at least 1947, and that for as long as their property has been in the family, they have treated the fence as the boundary line. Since 1947, the Lundgren family exclusively has harvested timber, cleared brush, kept the fence clear of fallen trees, and treated the disputed property on the southern side of the fence as their own.

¶4 The Tribe's land had been previously owned by Annabell Brown for many decades. In 1984, she quitclaimed a 1/4 undivided interest in the property to her son David Brown. Upon her death, the rest of the property passed to her other children, Paul Brown, Vivian Jennings, and Barbara Carrell. In 2013 the Tribe bought the property from Paul Brown, Jennings, and Carrell, receiving a statutory warranty deed. The Tribe was evidently unaware of the fence when it purchased the property. The Tribe's surveyors alerted the Tribe to the presence of the fence in October 2013 while surveying the property "in an effort to take the land into Trust." Clerk's Papers (CP) at 115.

¶5 In September 2014, the Tribe notified the Lundgrens in a letter that the fence did not represent the boundary and that they were asserting ownership rights to the entire property deeded to them in 2013. The Lundgrens initiated this lawsuit in March 2015. They asked the court to quiet title in the disputed property to them and sought injunctive relief. The

Lundgrens moved for summary judgment, arguing they acquired title to the disputed property by adverse possession or by mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss under CR 12(b)(1) for a lack of subject matter jurisdiction *863 based on the Tribe's sovereign immunity and under CR 12(b)(7),[1] which requires joinder of a necessary and indispensable party under CR 19.[2]

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[1] **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense[ ] may at the option of the pleader be made by motion: ... (7) failure to join a party under [CR] 19.

[2] "**(a) Persons to Be Joined if Feasible.** A person who is subject to service or process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

"**(b) Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) or (2) of section (a)

**572 ¶6 In the trial court, Judge Dave Needy denied the Tribe's motion to dismiss. The Tribe moved for direct discretionary review of this ruling. Judge Susan Cook later granted the Lundgrens' motion for summary judgment, holding the Lundgrens' "claims of title ownership by adverse possession and mutual recognition and acquiescence is established. Legal title to the disputed property is owned by Plaintiffs." CP at 159. Judge Cook noted that the fence was not hidden. Both parties recognized the fence as the boundary line and that it had clearly been on the property for much longer than the necessary 10 years. She noted that the Lundgrens' labor on the property was established by *864 numerous witness declarations. Importantly, she stated that "this is as clear as a case as I've had on the bench." Verbatim Report of Proceedings (VRP) (May 7, 2015) at 20. The Tribe amended its motion for discretionary review to seek review of both Judge Needy's and Judge Cook's orders. We accepted direct review. *See* Order, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (Wash. Feb. 10, 2016).

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hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

ANALYSIS

¶7 The superior court concluded that because it had in rem jurisdiction, it could determine ownership of the land without the Tribe's participation. *See* VRP (Apr. 24, 2015) at 24. While it recognized it could not join the Tribe against its will, the court found the Tribe's attempt to use CR 19 to be "contrary to common sense, fairness, and due process for all involved." VRP (Apr. 24, 2015) at 32.

¶8 The Tribe argues that dismissal is required for two reasons. First, it argues the superior court lacks jurisdiction because the Tribe has sovereign immunity from suit, which neither the Tribe nor Congress has waived for quiet title actions. *See* Appellant's Opening Br. at 10. The Tribe differentiates between an in rem claim and in rem jurisdiction, asserting that "jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties. Thus, the mere fact of an *in rem* claim does not affect or somehow avoid threshold jurisdictional questions such as sovereign immunity." Appellant's Reply Br. at 5. Second, it argues that even if the lower court had in rem jurisdiction to hear the case, CR 19 requires dismissal because the Tribe is a necessary and indispensable party that cannot be joined due to sovereign immunity. *See* Appellant's Opening Br. at 24-30; Appellant's Reply Br. at 1.

¶9 The Lundgrens acknowledge that the Tribe has sovereign immunity. Resp'ts' Br. at 6 ("The Lundgrens admit that the Tribe is entitled to

sovereign immunity."). They argue *865 that because the court has in rem jurisdiction over the quiet title action, personal jurisdiction over the Tribe is unnecessary and its immunity is irrelevant. They also assert that because they obtained title by adverse possession before the Tribe purchased the property, "[t]he Tribe's sovereign immunity does not deprive the court jurisdiction over land the Tribe never owned." Resp'ts' Br. at 23. With regard to CR 19, the Lundgrens argue, "[b]ecause the Court has *in rem* jurisdiction, sovereign immunity is not a bar to jurisdiction, the Tribe is not an indispensable party, and Civil Rule 19 does not prevent the case from proceeding." Resp'ts' Br. at 29.

I. In Rem Jurisdiction

¶10 Superior courts in Washington have jurisdiction to exercise in rem jurisdiction to settle disputes over real property.[3] Quiet title actions are proceedings in rem. *Phillips v. Tompson*, 73 Wash. 78, 82, 131 P. 461 (1913); *see also* 14 Karl B. Tegland, Washington Practice: Civil Procedure § 5:1, at 155 (2d ed. 2009). In such proceedings, the court has jurisdiction over the property itself. *See* Tegland, *supra*. Personal jurisdiction over the landowner is not required. *In re Acquisition of Land & Other Prop. by City of Seattle*, 56 Wash.2d 541, 544-45, 353 P.2d 955 (1960); *see also* ***573 In re Condemnation Petition*

[3] Article IV, section 6 of the Washington Constitution expressly establishes that our state's superior courts "shall have original jurisdiction in all cases at law which involve the title or possession of real property." *See also* RCW 2.08.010.

City of Lynnwood, 118 Wash. App. 674, 679 & n.2, 77 P.3d 378 (2003) (noting that quiet title actions are proceedings in which the court can exercise in rem jurisdiction, and that "[c]ourts may have jurisdiction to enter judgment with respect to property . . . located within the boundaries of the state, even if personal jurisdiction has not been obtained over the persons affected by the judgment").

*¶11 A court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion *866 of sovereign immunity. The United States Supreme Court has recognized this principle. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), the county sought to foreclose property within the Yakama Indian Reservation for failure to pay ad valorum taxes. The Yakama Nation argued that state jurisdiction could not be asserted over fee-patented reservation land. The Supreme Court held that the Indian General Allotment Act allowed Yakima County to impose ad valorum taxes on reservation land. 25 U.S.C. §§ 334-381. The Court reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 869-72, 929 P.2d 379 (1996) (describing *County of Yakima*, 502 U.S. 251).

¶12 This court has similarly upheld a superior court's assertion of in rem jurisdiction over tribally owned fee-patented land. In *Anderson*, this court held that the Grays Harbor County Superior Court had in rem jurisdiction over an action to partition and quiet title to fee-patented lands within the Quinault Indian Reservation. In that case, the Quinault Indian nation purchased a 1/6 interest in the surface estate of fee-patented land subject to a pending suit to partition and to a lis pendens. Relying on *County of Yakima*, and noting that an action to partition and quiet title is "a much less intrusive assertion of state jurisdiction over reservation fee patented land" than taxing and foreclosing fee lands, the court concluded the "Superior Court had proper in rem jurisdiction over [the] suit to quiet title and partition alienable and encumberable fee patented property situated within the Quinault Indian Reservation.... An action for partition of real property is a proceeding *867 in rem." *Anderson*, 130 Wash.2d at 872, 873, 929 P.2d 379. Furthermore, it was

> not disputed that the trial court had proper jurisdiction over this action when it was filed. The subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity in personam, but over the property or the "res" in rem.

Anderson, 130 Wash.2d at 873, 929 P.2d 379. The court was exercising jurisdiction over the property, not over the Quinault Indian nation, and thus the land was "subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Anderson*, 130 Wash.2d at 873, 929 P.2d 379. Because the court determined there was in rem jurisdiction, it did not need to address sovereign immunity.

¶13 Relying on *Anderson*, Division One of the Court of Appeals held that the court could exercise in rem jurisdiction in the quiet title action in which the Stillaguamish Tribe of Indians purchased land with notice of a pending quiet title action. *Smale v. Noretep*, 150 Wash. App. 476, 208 P.3d 1180 (2009). In *Smale*, the Smales sought to quiet title to property they claimed to have acquired through adverse possession against Noretep, the non-Indian original owner. After the Smales sued, Noretep sold the property by statutory warranty deed to the Stillaguamish Tribe. The deed noted the pending quiet title action, and the Smales added the Stillaguamish Tribe as a defendant. The Stillaguamish Tribe argued that sovereign immunity barred the action. The court found:

> Because courts exercise in rem jurisdiction over property subject to quiet title actions, our Supreme Court has held that transferring **574 the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the

> property. Accordingly, we hold that the superior court's continuing jurisdiction over the land claimed by the Smales for *868 the purposes of determining ownership does not offend the Tribe's sovereignty.

Smale, 150 Wash. App. at 477, 208 P.3d 1180.

¶14 The court noted, "The quiet title action in *Anderson* is similar to the quiet title action here in two crucial ways: both are proceedings in rem to determine rights in the property at issue and neither has the potential to deprive any party of land they rightfully own." *Smale*, 150 Wash. App. at 483, 208 P.3d 1180. The Smales alleged they acquired title to the land via adverse possession *before* the original owner sold to the Stillaguamish Tribe. If this were true, the Stillaguamish Tribe never possessed the land and thus never had land to lose. Nor were the Smales attempting to adversely possess against a sovereign. The court concluded that, as in *Anderson*, the doctrine of sovereign immunity did not apply and did not bar the quiet title action. *County of Yakima*, *Anderson*, and *Smale* establish the principle that our superior courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.

II. CR 19

¶15 Next, we turn to whether the Tribe must be joined to allow the action to proceed under CR 19. The Tribe asserts that even if the trial court had in rem

jurisdiction to hear the case, CR 19 requires dismissal because the Tribe is a necessary and indispensable party that cannot be joined due to sovereign immunity. Appellant's Opening Br. at 24. We disagree. In reaching our decision, we highlight the importance of CR 19 as a prudential standard that asks not whether a court has the *power* to decide a case, but rather whether it *should*.

¶16 CR 19(a) involves a three-step analysis. *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 222-23, 285 P.3d 52 (2012). First, the court determines whether absent persons are "necessary" for a just adjudication. If the absentee parties are "necessary," the court determines whether *869 it is feasible to order the absentee's joinder. Joinder is generally not feasible when tribal sovereign immunity is asserted. *Auto. United Trades Org.*, 175 Wash.2d at 222 (citing *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 780-81 (9th Cir. 2005)). "If joining a necessary party is not feasible, the court then considers whether, 'in equity and good conscience,' the action should still proceed without the absentees under CR 19(b)." *Auto. United Trades Org.*, 175 Wash.2d at 222. We have recognized that "[d]ismissal under CR 12(b)(7) for failure to join an indispensable party is a 'drastic remedy' and should be ordered only when the defect cannot be cured and significant prejudice to the absentees will result." *Auto. United Trades Org.*, 175 Wash.2d at 222-23 (citing *Gildon v. Simon Prop. Grp., Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006) (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1609, at 130 (3d ed. 2001))).

A. "Necessary" Party

¶17 A party must be joined if adjudication of the matter in the party's "absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." CR 19(a). The heart of the rule is the safeguarding of the absent party's legally protected interest. *Auto. United Trades Org.*, 175 Wash.2d at 223, 285 P.3d 52.

**¶18 The Tribe asserts that it has a legally protected interest because it claims record title ownership of the disputed property. Appellant's Opening Br. at 25. An inquiry under CR 19, as required by our cases, involves a merit-based determination that an interest will be adversely affected in the litigation. In an in rem action, the property at issue is the focus of the proceeding. The nature and end result of an in rem action **575 determines often competing interests in the property. This analysis is in contrast to civil actions, where the nature and end result is relief or *870 judgment. This difference is important here in the context of a legally protected interest because the Lundgrens are not seeking to divest a sovereign of ownership or control. Rather, they are attempting to retain what they already own. Where no interest exists, nonjoinder presents no jurisdictional barriers. While this analysis seems, in a way, to put "the cart before the horse," this is the relevant CR 19 analysis. Here, as

our cases recognize, and as the trial court found, Sharline and Ray Lundgren acquired ownership by adverse possession long *before* the property was purchased by the Tribe. To find sovereign immunity, some impact on a sovereign's interest should exist. No such interest exists in this case. In the trial court, the Tribe challenged the Lundgrens' lawsuit to quiet title and defended against the motion for summary judgment.[4] The Tribe claimed material issues of fact existed and challenges the summary judgment order here. Considering the facts in the light most favorable to the nonmoving party, we will affirm the trial court's grant of summary judgment if we determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Lundgrens are entitled to judgment as a matter of law if the undisputed facts establish that the Lundgrens would have succeeded on an adverse possession claim. We hold that they have.

¶19 To succeed on an adverse possession claim, possession must be "(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." *ITT Rayonier, Inc. v. Bell*, 112 Wash.2d 754, 757, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984)). "Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years."

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[4] In rem actions require giving notice to any and all persons or entities who may claim an interest in the property to allow those potential claimants the opportunity to participate in the action and assert their interest.

ITT Rayonier, Inc., 112 Wash.2d at 757 (citing RCW 4.16.020). Additionally, we have *871 held that title becomes vested when the elements of adverse possession, specifically the 10 year time period, are established. In *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012), we recognized this principle. In that case, the claim was asserted and we found that title was acquired before the government purchased the land in question. We held that, as long as the requisites of adverse possession were met before the property was transferred to the government, RCW 4.16.160—which otherwise shields the government from claims of adverse possession—did not control. We found that the quiet title lawsuit against the city could proceed since the legal determination only confirmed that the claim of adverse possession was satisfied before the city acquired the property. The principles recognized in *Gorman* are important here because the Lundgrens' claim is based on the fact that title to the land was acquired long before the Tribe purchased the adjacent land.

¶20 The trial court, in granting summary judgment, relied on numerous declarations to find in favor of the Lundgrens. The record establishes that the disputed property has been in the Lundgrens' extended family since 1947, first purchased by Sharline Lundgren's grandmother. A permanent, visible, 1,306 foot long fence marked the boundary between the two properties for decades. The Tribe argues that evidence exists that "shows a dispute as to the parties' knowledge of the existence of the fence." Appellant's Opening Br. at 34. Annabell Brown's

brother-in-law, Ray Brown, confirmed that both families were aware of the boundary fence and treated it as the property line. The Tribe asserts that Annabell Brown's son, David Brown, had no idea the fence was there. Assuming this is true, David Brown's lack of knowledge is not material to the legal issue in this case because the Lundgrens' use of the land was sufficient to satisfy the elements of adverse possession. "Open" and "notorious" mean that activities or objects on the land are visible and discoverable, if not actually known, to the true owner. 17 Wil **576 liam B. Stoebuck & John W. Weaver, *872 Washington Practice: Real Estate: Property Law § 8.11, at 523 (2d ed. 2004). "[T]he owner is charged with constructive notice of permanent, visible objects placed on the ground, even if they are only slightly upon the land and would be seen to intrude only by scrupulous inspection or even by professional survey." Stoebuck & Weaver, *supra*, at 525. The evidence shows that the Lundgrens exclusively possessed and maintained the disputed property. The Tribe asserted no evidence to rebut the testimony that the Lundgrens and their predecessors have gone onto the property, cut trees, trimmed branches, and perhaps mended the fence in the last 70-plus years. Significantly, Judge Cook, in granting summary judgment, stated that "this is as clear as a case as I've had on the bench." VRP (May 7, 2015) at 20. We find the material facts undisputed and affirm the entry of order of summary judgment.

B. "Indispensable" Party

*¶21 Because we have found that the Tribe is not

a necessary party, we need not continue the CR 19 analysis. However, it is important to note that the principle of indispensability is rooted in equitable considerations. *Auto. United Trades Org.*, 175 Wash.2d at 227 (citing *Crosby v. Spokane County*, 137 Wash.2d 296, 309, 971 P.2d 32 (1999)). The central question is whether an action can proceed "in equity and good conscience." CR 19(b). The CR 19 inquiry requires "careful exercise of discretion" and is "'heavily influenced by the facts and circumstances of individual cases.' " *Auto. United Trades Org.*, 175 Wash.2d at 229 (quoting Wright, Miller & Kane, *supra*, § 1604, at 39). Of importance here is that dismissal would result in no adequate remedy for the plaintiff. Because of a strong aversion to dismissal, great weight is given to this factor. There is no alternative judicial forum for the Lundgrens. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (June 9, 2016), at 11 min., 42 sec. to 12 min., 07 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org (explaining that although there is a tribal court, "the Upper Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs").

¶22 The purpose of CR 19 is to serve " 'complete justice' " by permitting disputes to go forward only when all parties are present to defend their claims. *Auto. United Trades Org.*, 175 Wash.2d at 233. But as we stated in *Automotive United Trades Organization*, " 'complete justice' may not be served

when a plaintiff is divested of all possible relief because an absent party is a sovereign." 175 Wash.2d at 233. In this instance, dismissal leads to no justice at all. In *Automotive United Trades Organization*, we emphasized that sovereign immunity is meant to be raised as a shield by a tribe, not as a sword. Here, a survey of the property was done a month after the property was deeded to the Tribe. *See* Appellant's Opening Br. at 5-6. A survey of the property *before* purchase would have disclosed the existence of the fence and at minimum put a purchaser on notice to determine the property boundaries. The Lundgrens had acquired title by adverse possession decades before the Tribe acquired record title in 2013. After the Lundgrens commenced the quiet title action, the Tribe claimed sovereign immunity and joinder under CR 19 to deny the Lundgrens a forum to acquire legal title to property they rightfully own. The Tribe has wielded sovereign immunity as a sword in disguise. While we do not minimize the importance of tribal sovereign immunity, allowing the Tribe to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder. *See Auto. United Trades Org.*, 175 Wash.2d at 233-34, 285 P.3d 52. Finding otherwise, as correctly articulated by the trial court, is "contrary to common sense, fairness, and due process for all involved." VRP (Apr. 24, 2015) at 32. We affirm the superior court.

WE CONCUR:
Owens, J.
Wiggins, J.
**577 González, J.
Yu, J.

STEPHENS, J. (dissenting)

*874 ¶23 It is well established that "tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation." *Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108, 112, 147 P.3d 1275 (2006) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978)). " '[S]ociety has consciously opted to shield Indian tribes from suit,' " *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 230, 285 P.3d 52 (2012) (internal quotation marks omitted) (quoting *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991)), because tribes are " 'separate sovereigns pre- existing the Constitution,' " *Michigan v. Bay Mills Indian Cmty.*, __ U.S. __, 134 S.Ct. 2024, 2030, 188 L.Ed. 2d 1071 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 56, 98 S.Ct. 1670). Brushing aside this fundamental principle, the majority concludes that the Upper Skagit Indian Tribe (Tribe) must either waive its sovereign immunity and defend against Sharline and Ray Lundgren's adverse possession claim, or else risk having judgment entered in its absence. The majority justifies this result on the ground that personal jurisdiction over the Tribe is unnecessary in an in rem action to quiet title. Majority at 579-80. It also insists that the Tribe has no interest in the disputed property because the Lundgrens' claim of adverse possession predates the Tribe's ownership, and therefore the Tribe is not a necessary party to this suit. *Id.* at 577, 581.

¶24 I respectfully dissent. While the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties, Civil Rule (CR) 19 counsels against exercising this authority in the face of a valid assertion of sovereign immunity. Proceeding without regard to the Tribe's defense, the majority gives "insufficient weight" to the sovereign status of the Tribe and erroneously "reach[es] and discount[s] the merits of [the Tribe's] claims." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855, 864, 128 S.Ct. 2180, 171 L.Ed. 2d 131 (2008).

*875 ¶25 Applying the analysis of CR 19, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined in this quiet title action. The result is clear under our precedent: we should dismiss this case without reaching the merits of the Lundgrens' claims. Accordingly, I would reverse the superior court and remand for entry of an order of dismissal under CR 12(b)(7).

ANALYSIS

¶26 The only difference between this case and others in which we have respected assertions of tribal sovereign immunity is that the superior court's jurisdiction to quiet title rests on in rem jurisdiction. Focusing on this jurisdictional basis, the majority looks to cases that recognize the superior court's power to proceed. *See, e.g., County of Yakima v. Confederated Tribes & Bands of the Yakima Indian*

Nation, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed. 2d 687 (1992); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 929 P.2d 379 (1996); *Smale v. Noretep*, 150 Wash. App. 476, 208 P.3d 1180 (2009). The majority reads these cases to support its conclusion that "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11; *cf. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar "a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. Ex rel. Bd. of Trs. of Internal Improvement Tr. Fund*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] None of these cases

[1] It is worth noting, however, that recent decisions question whether a court may exercise in rem jurisdiction over cases in which a tribe asserts its sovereign immunity, particularly since the Supreme Court issued its decision in *Bay Mills*, which reiterated the importance of sovereign immunity. *See Hamaatsa, Inc. v. Pubelo of San Felipe*, 2016 WL 3382082, at *7 (N.M. June 16, 2016) (holding "regardless of whether Hamaatsa asserts claims that lie *in rem* or *in personam*, its action against the Pueblo is barred in accordance with federal law. Because

address the impact of a tribe's CR 19 claim.

I. CR 19 Counsels against Exercising in Rem Jurisdiction in the Face of a Valid Assertion of Sovereign Immunity

¶27 The majority acknowledges that CR 19 reflects a prudential standard: "CR 19 ... asks not whether a court has the *power* to decide a case, but rather whether it *should*." Majority at 11. But the majority fails to acknowledge the significance of the Tribe's interest and the Lundgrens' inability to obtain personal jurisdiction over the Tribe. Instead, the majority seems to believe that because the court has in rem jurisdiction, there is no need to engage in a full CR 19 analysis. This reasoning is flawed. The court's

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tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether Hamaatsa's claim is asserted *in rem* or *in personam*" and specifically noting that while *Anderson* carved out an exception "to tribal sovereign immunity for *in rem* actions," that case was decided before *Bay Mills*, which "unequivocally bars us from carving out a similar exception"); *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) (finding *Bay Mills* reaffirmed the importance of sovereign immunity and that it protects a tribe from any suit absent waiver or congressional authorization, and declining "to draw ... a distinction between *in rem* and *in personam* proceedings"). Because I would decide this case under CR 19, I do not reexamine our precedent in light of *Bay Mills*. Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima*, though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*.

authority to exercise in rem jurisdiction does not obviate the need to determine which parties must be joined to fully and justly adjudicate the action. Which parties are necessary and indispensable is a separate question from the court's jurisdiction—one I find dispositive in this case given the Tribe's sovereign immunity.

*877 ¶28 Sovereign immunity affects personal jurisdiction. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (" '*Indian Nations are exempt* from suit' " (emphasis added) (quoting *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940))); *see also Anderson,* 130 Wash.2d at 876, 929 P.2d 379 (describing tribal sovereign immunity under the "personal jurisdiction" section).[2] Though personal jurisdiction does not impact a superior court's subject matter jurisdiction for in rem proceedings, *In re Acquisition of Land & Other Prop. by City of Seattle,* 56 Wash.2d 541, 544-45, 353 P.2d

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[2] Sovereign immunity has been variously characterized as a matter of subject matter jurisdiction, and as a matter of personal jurisdiction. *See, e.g., Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009 (10th Cir. 2007) ("'Tribal sovereign immunity is a matter of subject matter jurisdiction.'" (quoting *E.F.W. v. St. Stephen's Indian High Sch.,* 264 F.3d 1297, 1302-03 (10th Cir. 2001))); *Wright,* 159 Wash.2d at 111, 147 P.3d 1275 ("The existence of personal jurisdiction over a party asserting tribal sovereign immunity is a question of law reviewed de novo."). It is not necessary to resolve this dispute here because this case can be resolved under CR 19. Under that standard, in quiet title actions where an absent sovereign may be stripped of land to which it has a legitimate claim, an assertion of sovereign immunity is dispositive and requires dismissal.

955 (1960), it does impact a superior court's ability to join a nonparty. *See Equal Emp'l Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005) ("Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, *when the absentee is not subject to personal jurisdiction*, and when joinder would destroy subject matter jurisdiction." (emphasis added)); *see also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial 7-37 (2010) ("Joinder is not 'feasible' where ... the party sought to be joined is *immune* from suit"). Personal jurisdiction is thus very relevant to a court's CR 19 analysis.

¶29 The Tribe is not subject to personal jurisdiction because, as is conceded, it has **579 sovereign immunity. Resp'ts' Br. at 6. Therefore, while the Tribe is incorrect that "[in rem] jurisdiction in this case can only lie if the Court has both subject matter jurisdiction and personal jurisdiction over the claims and parties," Appellant's Reply Br. at 5, it is *878 correct that personal jurisdiction, in part, dictates the outcome of this case. We must consider personal jurisdiction under the analysis of CR 19.

II. The Tribe Is a Necessary and Indispensable Party

¶30 We recently addressed CR 19 in a case implicating tribal sovereignty, noting that it applies "when the joinder of absent persons is needed for a just adjudication." *Auto. United Trades Org.*, 175 Wash.2d at 221, 285 P.3d 52. "Where the feasibility

of joinder is contested, courts engage in a three-step analysis." *Id.* First, the court determines whether the absent party is " 'necessary' " under CR 19(a). *Id.* at 222, 285 P.3d 52. If the party is "necessary," the court then determines whether joinder is feasible. *See id.* If it is not feasible to join the party, the court "determine[s] whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." CR 19(b). If the action cannot proceed "in equity and good conscience" without the absent party, that party is considered "indispensable." *Id.*; *Auto. United Trades Org.*, 175 Wash.2d at 229, 285 P.3d 52.

¶31 The party urging dismissal for failure to join a necessary and indispensable party bears the burden of persuasion. *See Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52. "We review a [superior] court's decision under CR 19 for an abuse of discretion and review any legal determinations necessary to that decision de novo." *Id.* We find an abuse of discretion "if the [superior] court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Gildon v. Simon Prop. Grp., Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006). Dismissal under CR 12(b)(7) is a " 'drastic remedy.' " *Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52 (quoting *Gildon*, 158 Wash.2d at 494, 145 P.3d 1196). Because our Civil Rule and Federal Rule of Civil Procedure (FRCP) 19 are substantially similar, we may look to federal case law for guidance. *Id.* at 223, 285 P.3d 52.

¶32 Here, the superior court denied dismissal based on CR 19 without engaging in the required analysis. In its oral *879 ruling, the court stated that although it understood it could not join the Tribe against its will,

> it seems to me that the Tribe is the one saying that this property, which by its appearance may be adversely possessed long before the Tribe came into it, is asking to bar litigation for the other side rather than the other way around ... and I find that contrary to common sense, fairness, and due process for all involved.

Verbatim Report of Proceedings (Apr. 24, 2015) (VRP) at 32. While the superior court's concerns are understandable, they reflect a desire to reach the merits of the action so that both parties can have their day in court. The majority adopts this approach unapologetically, asserting without a full analysis of the rule's factors that CR 19 requires "a merit-based determination," even though this seems "to put 'the cart before the horse.' " Majority at 575. In fact, CR 19 *precludes* a court from considering the merits when one of the parties validly asserts sovereign immunity. *See, e.g., Auto. United Trades Org.*, 175 Wash.2d at 224, 285 P.3d 52 (noting the CR 19 analysis focuses "on whether a party *claims* a protected interest, not whether it *actually has* one"); *see also Gildon*, 158 Wash.2d at 494, 145 P.3 1196 (contrasting "[d]ismissal under CR 12(b) (7)" with "trials *on the merits*" (emphasis added)). As the Supreme

recognized in *Pimentel*, beyond the threshold determination that claims are not frivolous in evaluating the CR 19 factors, "consideration of the merits [is] itself an infringement on foreign sovereign immunity." 553 U.S. at 864, 128 S.Ct 2180. Indeed, it would make no sense that a court evaluating the interests of a party who cannot be joined to an action could summarily decide the party will lose, and therefore has no interests to protect.[3]

A. The Tribe Is a "Necessary" Party

**580 *880 ¶33 A party is "necessary" if "the

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[3] The Court of Appeals analysis in *Smale*, on which the superior court and the majority rely, is problematic in this regard when read in light of the CR 19 cases. *See* VRP at 31. The *Smale* court broadly stated that the quiet title action at issue did not have "the potential to deprive any party of land they rightfully own" because the Smales asserted they acquired title by adverse possession before the Tribe bought the property. 150 Wash. App. at 483, 208 P.3d 1180; *see also id.* at 480-81, 208 P.3d 1180 ("[I]f the Smales acquired title before the suit was filed and Noretep attempted to convey the land, Noretep had no title to convey. Thus, the tribe never had any property to lose."). The court justified its consideration of the merits on the procedural posture of the case; the tribe moved to dismiss for lack of jurisdiction under CR 12(b)(1), so the court *assumed* the Smales could prove adverse possession. *Id.* at 481 n. 15, 208 P.3d 1180. The majority's reliance on *Smale* is concerning for two reasons. First, the majority goes further than *Smale* by actually *resolving* the merits. *Compare* majority at 581 (the Lundgrens "are attempting to retain what they *already* own" (emphasis added)), *with Smale*, 150 Wash. App. at 482, 208 P.3d 1180 ("the Smales are attempting to retain what they *allegedly* own" (emphasis added)). Second, no similar presumption to that under CR 12(b)(1) applies in considering CR 19 and a motion to dismiss under CR 12(b)(7).

person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest." CR 19(a)(2) (A). The claimed interest must be legally protected. *Auto. United Trades Org.*, 175 Wash.2d at 224, 285 P.3d 52. As noted above, the main inquiry here is "whether a party *claims* a protected interest, not whether it *actually has* one." *Id.*

¶34 In concluding that the Tribe has no interest because the Lundgrens satisfied the elements of adverse possession, the majority takes its CR 19 analysis too far. Majority at 581-82. The Tribe claims record title ownership of the disputed property. This is a cognizable claim for a legally protected property interest. *See Cady v. Kerr*, 11 Wash.2d 1, 8, 14-15, 118 P.2d 182 (1941) (stating that parties with a legal or equitable interest in property directly affected by a boundary dispute must be defendants in the boundary line adjudication); *Reitz v. Knight*, 62 Wash. App. 575, 585, 814 P.2d 1212 (1991) ("In the context of boundary line disputes, joinder ordinarily is required only of persons who own property adjacent to the disputed boundary line."); RCW 7.28.010 ("[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, *to be brought against the tenant in possession;* if there is no such tenant, then *against the person**881 *claiming the title* or some interest therein" (emphasis added)); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458-59 (9th Cir. 1994) (finding

the Quinault Indian Nation was a necessary party because it had a claim to escheated property within its reservation). The Tribe is clearly a necessary party to this lawsuit.

B. The Tribe Cannot Be Joined Due to Sovereign Immunity

¶35 Having determined that the Tribe is a necessary party, the next question is whether the Tribe can feasibly be joined. "Joinder is not feasible when tribal sovereign immunity applies." *Auto. United Trades Org.*, 175 Wash.2d at 222, 285 P.3d 52. Because the parties agree that the Tribe has not waived its sovereign immunity, the Tribe cannot be joined.[4]

C. The Tribe Is an Indispensable Party

¶36 Because the Tribe is a necessary party that cannot be joined, we must determine if the Tribe is indispensable. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991).

¶37 Federal courts have consistently recognized "that when the necessary party is immune from suit,

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[4] Sovereign immunity may be waived either by the tribe or congressional abrogation. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991). As noted above, the Lundgrens admit that the Tribe is entitled to sovereign immunity. *See* Resp'ts' Br. at 6. They do not argue that either the Tribe or Congress waived this immunity.

there may be 'very little need for balancing [FRCP] 19(b) factors because immunity itself may be viewed as the **581 compelling factor.' " *Quileute Indian Tribe*, 18 F.3d at 1460 (quoting *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1499)). Indeed, "comity and respect for sovereign interests often outweigh all other factors in disposing of the joinder question" because " 'society has consciously opted to shield Indian tribes from suit.' " *Auto. United Trades Org.*, 175 Wash.2d at 230, 285 P.3d 52 (internal quotation marks omitted) (quoting *882 *Fluent*, 928 F.2d at 548). Courts, however, may still apply the four factors to determine whether a tribe is an indispensable party. *Quileute Indian Tribe*, 18 F.3d at 1460. These factors are:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). Analyzing and balancing these factors,[5]

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[5] The majority refuses to balance the parties' interests, choosing instead to ignore three of the four factors. Majority

I would conclude that the Tribe is an indispensable party.

1. CR 19(b)(1): Prejudice

¶38 Under CR 19(b)(1), we "assess[ ] the *likelihood and significance* of any prejudice." *Auto. United Trades Org.*, 175 Wash.2d at 229, 285 P.3d 52. This factor favors the Tribe for two reasons. First, this court has found that "[i]n evaluating the extent of prejudice, we accord heavy weight to the tribes' sovereign status." *Id.* "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). "Among the core aspects of sovereignty that tribes possess—subject ... to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Bay Mills*, 134 S. Ct. at 2030 (quoting *883 *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670). That sovereign immunity against suit "is 'a necessary corollary to Indian sovereignty and self-governance.' " *Id.* (quoting *Three Affil. Tribes of Fort Berthold Reservation v. Wold*

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at 582-83; *cf. Auto United Trades Org.*, 175 Wash.2d at 229, 285 P.2d 52 ("In examining *each* of the four factors ... the court determines how heavily the factor weighs in favor of, or against, dismissal." (emphasis added)). The sole factor the majority considers conveniently favors the Lundgrens (remedy for the plaintiffs), while the three it ignores favor the Tribe (prejudice, avoiding or reducing prejudice, and adequacy of the judgment).

Eng'g, PC, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed. 2d 881 (1986)). "Where tribal sovereign immunity is concerned, 'respect for the inherent autonomy Indian tribes enjoy has been particularly enduring.' " *Auto. United Trades Org.*, 175 Wash.2d at 230, 285 P.3d 52 (quoting *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999)). This factor strongly favors finding the Tribe to be an indispensable party. *See id.* at 229-31, 285 P.3d 52; *cf. Pimentel*, 553 U.S. at 867, 128 S.Ct. 2180 (discussing cases of joinder and the governmental immunity of the United States; finding under the first factor that "[t]hese cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign").

¶39 Importantly, a judgment entered in the Tribe's absence would not bind the Tribe to a determination that the Lundgrens adversely possessed the disputed property. *See Cady*, 11 Wash.2d at 8, 118 P.2d 182, (explaining parties who have a direct interest in the result of a boundary line dispute must be joined "for otherwise such persons are not bound as to any determination of the location of the boundaries"); *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (finding the tribal council to be a necessary party in a dispute over the beneficial owners of trust property because "even if the Association obtained its requested relief in this action, it would not have complete relief, since judgment against **582 the government would not bind the Council, which could

assert its right to possess the Ranch"); *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1498 (finding that in an action challenging the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority for the Quinault *884 Indian Reservation that "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation").

¶40 A determination of title to the disputed property without the Tribe being a party to the litigation casts a shadow over the Tribe's ownership. *See Quileute Indian Tribe*, 18 F.3d at 1460 (agreeing with the lower court's conclusion "that the Quinaults 'would suffer severe prejudice by not being a party to an action which could deplete the Quinaults' land interests or jeopardize their authority to govern the lands in question' " (quoting *Quileute Indian Tribe v. Lujan*, C91-558C, 1992 WL 605423, at *3 (W.D. Wash. Aug. 28, 1992) (court order)). At the same time, proceeding without the Tribe could prevent the Lundgrens from providing marketable title should they someday wish to sell their property. *See Hebb v. Severson*, 32 Wash.2d 159, 166, 201 P.2d 156 (1948) ("[M]arketable title is one that is free from reasonable doubt and such as reasonably well informed and intelligent purchasers, exercising ordinary business caution, would be willing to accept."). It thus prejudices both the Tribe and the Lundgrens. *See* CR 19(b)(1); *Pimentel*, 553 U.S. at 869, 128 S.Ct. 2180 (FRCP 19(b)'s first factor "directs consideration of prejudice both to absent persons and those who are

parties"). This factor strongly favors dismissal.

2. CR 19(b)(2): Avoiding or Reducing Prejudice

¶41 A further relevant inquiry is whether the court could lessen or avoid prejudice by "protective provisions in the judgment, by the shaping of relief, or [by] other measures." CR 19(b)(2). The Lundgrens do not propose any way the court could lessen prejudice. I am unable to imagine a remedy that would lessen the prejudice that results from quieting title to disputed property in the absence of the record title holder. The majority fails to acknowledge that we cannot require the Tribe to waive its sovereign immunity *885 to lessen prejudice. *See Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500 ("the ability to intervene if it requires waiver of immunity is not a factor that lessens prejudice" (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)). This factor also strongly favors dismissal.

3. CR 19(b)(3): Adequacy of the Judgment

¶42 The third factor—the adequacy of a judgment rendered without the Tribe—also weighs in favor of dismissal. *See* CR 19(b)(3). "Adequacy" here " 'refers to the public stake in settling disputes by wholes, whenever possible.' " *Auto. United Trades Org.*, 175 Wash.2d at 232, 285 P.3d 52 (internal quotation marks omitted) (quoting *Pimentel*, 553 U.S. at 870, 128 S.Ct.2180). "A party who seeks to quiet title to a piece of land must join all known persons who are

claiming title in order to settle the property's ownership without additional litigation." 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1621, at 334 (3d ed. 2001). As noted above, the Tribe may not be bound by a determination made in its absence, and the Lundgrens may not be able to obtain secure title absent a judgment against the Tribe. The dispute cannot be completely and definitively settled without joining the Tribe.

4. CR 19(b)(4): Remedy for the Plaintiffs

¶43 Finally, I consider whether the Lundgrens would have a remedy if this case were to be dismissed. *See* CR 19(b)(4). I agree with the majority that this factor weighs in favor of the Lundgrens. It appears that the Lundgrens do not have another judicial forum in which they may seek relief if this claim were to be dismissed for failure to join the Tribe. *See* Wash. Supreme Court oral argument, *Lundgren v. Upper Skagit Indian Tribe*, No. 91622-5 (June 9, 2016), at 11 min., 42 sec., *recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org (explaining that although **583 there is a tribal court, "the Upper *886 Skagit Indian Tribe has not waived its sovereign immunity from suit in its tribal court, so there would not be a claim in the Upper Skagit Tribal Court to be brought by the plaintiffs"). However, the majority fails to recognize that "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe*, 910 F.2d at 560. Courts respect the

need to dismiss claims for inability to join a necessary and indispensable sovereign even when doing so denies the plaintiff any remedy. *See, e.g., Pit River*, 30 F.3d at 1102-03; *Quileute Indian Tribe*, 18 F.3d at 1460-61; *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500; *cf. Pimentel*, 553 U.S. at 872, 128 S.Ct. 2180 ("Dismissal under [FRCP] 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."). This simply underscores that dismissal under CR 19 can be a drastic remedy, albeit a proper one.

D. Balancing the CR 19(b) Factors

¶44 Balancing these four factors, I would conclude that the Tribe is a necessary and indispensable party that cannot be joined. The most logical result is that this case should be dismissed pursuant to the Tribe's CR 12(b)(7) motion, as the Lundgrens' interest in quieting title to the disputed property yields to the Tribe's interest in maintaining its sovereign immunity. I recognize that dismissal potentially leaves the Lundgrens without recourse. Although in our most recent CR 19 and sovereign immunity case we rejected dismissal due in part to the plaintiff's inability to obtain relief, that was a unique case in which the *State* attempted to assert tribal sovereign immunity "as a sword." *Auto. United Trades Org.*, 175 Wash.2d at 233, 285 P.3d 52. We explained, "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State." *Id.* Dismissal in that case "would have the effect of

immunizing *the State,* *887 not the tribes, from judicial review." *Id.* at 234.[6] Here, the Tribe has properly asserted its sovereign immunity as a shield to protect itself from suit. I would therefore respect the Tribe's status as a sovereign and dismiss the case without reaching the merits of the Lundgrens' claims.

CONCLUSION

¶45 I would reverse the superior court. Under the analysis of CR 19, the Tribe is a necessary and indispensable party that cannot be joined because of sovereign immunity. Accordingly, the Tribe is entitled to dismissal, and I would remand for entry of an order granting the Tribe's motion to dismiss under CR 12(b)(7).

WE CONCUR:

Gordon McCloud, J.
Fairhurst, C.J.
Madsen, J.

---

[6] The majority misses the mark when it asserts that the "Tribe has wielded sovereign immunity as a sword in disguise." Majority at 576. This statement rests on the mistaken premise that the Tribe seeks to take from the Lundgrens "title to property they rightfully own." *Id.* Even accepting as established the Lundgrens' claim that they adversely possessed the disputed property for decades before the Tribe took ownership, they never brought a claim of ownership until now. As a putative defendant in the Lundgrens' quiet title action, the Tribe holds record title—and the validity of that ownership is not in question absent a merits adjudication. Thus, the Tribe is asserting sovereign immunity defensively, to resist being haled into court. The situation could not be more different from the State's offensive assertion of tribal sovereign immunity in *Auto.*

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents,

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

ORDER AMENDING OPINION

It is hereby ordered that the following changes be made to the dissenting opinion of Stephens, J. in the above entitled case (page and line references are to the dissenting slip opinion filed on February 16, 2017):

1. Beginning on page 3, line 11 and continuing through page 4, line 7, the following language is deleted:

> The majority is correct that these cases support finding "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11. If these cases represented the sole

line of relevant authority, I might affirm. *Cf. Cass County Joint Water Res. Dist v. 1.43 Acres of Land*, 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar" a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. ex rel. Bd. Of Trs. of Internal Improvement Tr. Fund*, 78 So.3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] However, a finding that the court has in rem jurisdiction does not answer the issues before us. None of these cases address the impact of a tribe's CR 19 claim.

2. In place of the deleted language from pages 3 and 4, the following language is inserted:

> The majority reads these cases to support its conclusion that "where claims of sovereign immunity are asserted," a superior court has "subject matter jurisdiction over in rem proceedings" and may determine the

status of the property without obtaining in personam jurisdiction over the tribe. Majority at 11; *cf. Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, 643 N.W.2d 685, 691-95 (2002) (relying in part on *County of Yakima* and *Anderson*, and holding tribal sovereign immunity does not bar "a purely in rem action against land held by the Tribe in fee and which is not reservation land, allotted land, aboriginal land, or trust land"); *Miccosukee Tribe of Indians v. Dep't of Envtl. Prot. Ex rel. Bd. of Trs. of Internal Improvement Tr. Fund*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011) (holding tribal "sovereign immunity is not implicated and does not bar" an eminent domain action because it is "an action against land held in fee by the Tribe" and there is in rem jurisdiction over the land).[1] None of these cases address the impact of a tribe's CR 19 claim.

3. On page 4, last line, the following sentence is inserted at the end of footnote 1:

> Nor do I address whether our decision in *Anderson* rests on a misreading of *County of Yakima*, though this question will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*.

DATED this 8th day of June 2017.

Fairhurst, CJ
Chief Justice

APPROVED:

Madsen, J.
Gordon McCloud, J.
Stephens, J.

IN THE SUPREME COURT OF WASHINGTON

SHARLINE LUNDGREN and RAY LUNDGREN, wife and husband,

Respondents,

v.

UPPER SKAGIT INDIAN TRIBE,

Appellant.

No. 91622-5

Skagit County No. 15-2-00334-1

ORDER DENYING FURTHER RECONSIDERATION

The Court considered "APPELLANT'S MOTION FOR RECONSIDERATION". The Court entered an order amending opinion in the above cause on June 8, 2017.

Now, therefore, it is hereby **ORDERED:**

That further reconsideration is denied.

Dated at Olympia, Washington this 12 -day of June 2017, 2017.

For the Court

MARY FAIRHURST,
Chief Justice
Washington State
Supreme Court

No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the Upper Skagit Indian Tribe, a federally recognized Indian tribe. Petitioner was the defendant and appellant below. Respondents are Sharline and Ray Lundgren, who were the plaintiffs and respondents below.

There are no parent or publicly-held corporations involved in the proceeding.

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INTRODUCTION

Petitioner Upper Skagit Indian Tribe (the Tribe) purchased 39.56 acres of its ancestral land in Skagit County, Washington, by statutory warranty deed in 2013. Respondents Sharline and Ray Lundgren own adjacent land to the south of the Tribe's land. In 2015, the Lundgrens brought a quiet title action in Washington State court, arguing they are entitled to a portion of the Tribe's land by adverse possession. The Tribe invoked its sovereign immunity from suit and moved to dismiss the action.

This Court has repeatedly affirmed the importance and inviolability of tribal sovereign immunity from suit, and has recognized two, and only two, exceptions: waiver of the immunity by the tribe and abrogation of the immunity by Congress. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030–31 (2014).

Contrary to controlling precedent in this Court and despite the Upper Skagit Indian Tribe's invocation of its sovereign immunity from suit, the courts below permitted the Lundgrens' quiet title action to proceed based on the *in rem* nature of Washington State quiet title actions where there was neither a waiver nor congressional abrogation of sovereign immunity.

The Washington Supreme Court's ruling is based on what would amount to a third exception to tribal sovereign immunity for actions brought *in rem* against land owned by a federally recognized Indian

tribe. No such exception exists. The ruling cannot stand against controlling rulings of this Court. If affirmed, the decision would undermine the autonomy, territorial integrity, and resources of Indian tribes throughout the nation.

OPINIONS BELOW

The opinion of the Washington Supreme Court that is the subject of this appeal is reported at *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017), and reproduced at Joint Appendix 98–134. The order of the Washington Supreme Court amending its opinion is unreported but reproduced at Joint Appendix 135–138. The order of the Washington Supreme Court denying the motion for reconsideration is unreported but reproduced at Joint Appendix 139.

The opinion of the Washington Superior Court denying the Upper Skagit Indian Tribe's motion to dismiss is unreported but reproduced at Joint Appendix 75–76.

JURISDICTION

The Washington Supreme Court issued its decision on February 16, 2017, amended the decision on June 8, 2017, and denied reconsideration on June 12, 2017. The Upper Skagit Indian Tribe filed a petition for a writ of certiorari on September 11, 2017, and this Court granted the petition on December 8, 2017.

The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

RULES INVOLVED

Washington's Superior Court Civil Rules governing joinder of necessary parties provide in relevant part:

> **Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest

relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

Washington Civil Rule 19(a) (2017).

Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective

> provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Washington Civil Rule 19(b) (2017).

STATEMENT

1. In 1855, the predecessor aboriginal bands of the Upper Skagit Indian Tribe and the United States of America entered into the Treaty of Point Elliott. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661–62, 661 n.1, 662 n.2 (1979). By doing so, the United States recognized the Tribe as a sovereign and secured title to the lands the Tribe held in the Pacific Northwest. *See id.*

2. One hundred and fifty-eight years later, in 2013, the Tribe bought property in Skagit County, Washington, and received a statutory warranty deed. Clerk's Papers (CP) 85–88; *see* Skagit County property map exhibit, reproduced at Joint Appendix 33. This purchase was part of the Tribe's long-term effort to reclaim its ancestral lands for the religious, cultural, and economic benefit of its members, *see* Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* 97–98 (2001): the property is adjacent to other land the Tribe owns,

borders a tribal cemetery, and is where the Tribe buried its members killed by smallpox.

3. Until the early 1980s, the Tribe was landless save for a cemetery held in trust for the Tribe since 1914. *Id.* Congress was particularly concerned about landless tribes when, in 1934, it enacted the Indian Reorganization Act, authorizing acquisition of trust land for Indian tribes. 25 U.S.C. § 5108 (2017); H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934). The statute's "intent and purpose" was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934)). "Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (citations omitted).

4. The Tribe has secured approximately 500 acres (0.78 square miles) of trust land in the past. *See generally* Miller, *The Problem of Justice* at 98–99. The property at issue here is one of the last remaining pieces of that contiguous area. Because the land borders existing Tribe trust land, it is much more likely that the federal government will approve taking the land into trust. *See* 25 C.F.R. §§ 151.10–.11 (2018). Beyond the significant historical, religious, and cultural meaning this land holds for the Tribe, its acquisition for commercial development to support the Tribe's "economic base and its ability to

be self-sufficient[,] . . . to facilitate growth in tribal industry[,] and [to] ensure the use of the land for future generations" is encouraged by federal law. *U.S. Dep't of Interior*, 423 F.3d at 801.

5. There are two partially overgrown fences on the property, one of which, on the southern part, is relevant here. CP 8, 103–05, 115. Both fences are of the same vintage and are believed to have been installed by a prior owner of the property. CP 103–05. The southern fence runs north of and almost parallel to the southern deed line, and has a wide access gate. CP 103, 115; *see* fence line exhibit, reproduced at Joint Appendix 38, and access gate exhibit, reproduced at Joint Appendix 42. One of the previous property owners stated that he was not aware of the southern fence and that neither he nor his family members were told that anyone had built a fence there or intended to do so. CP 57–58.

6. Sharline and Ray Lundgren are the record owners of property immediately south of the subject property. CP 103, 115.

7. In March 2015, the Lundgrens filed a quiet title action in state court, naming the Tribe as the defendant, and alleging that they had acquired title to the property between the southern fence and the boundary line by adverse possession prior to the

Tribe's purchase.[1] CP 7–12; *Lundgren*, 389 P.3d at 571.

8. The Tribe entered a special appearance stating that it was not waiving its sovereign immunity, and filed a motion to dismiss the Lundgrens' complaint or, if denied, to stay proceedings while the Tribe sought appellate review. CP 256, 229–44. The trial court denied the Tribe's motion and shortly thereafter granted the Lundgrens' motion for summary judgment. CP 155–60. The Washington Supreme Court granted the Tribe's request for direct review of those decisions. *Lundgren*, 389 P.3d at 572; *see also* CP 141–43, 148–51.

9. In a 5-4 decision, the Washington Supreme Court affirmed, holding that the Tribe's sovereign immunity did not bar suit. *Lundgren*, 389 P.3d at 572–74. To reach this conclusion, the court construed *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), to support the proposition that courts may exercise *in rem* jurisdiction over property owned by a federally recognized Indian tribe despite its sovereign immunity from suit. 389 P.3d at 573. The court also looked to Washington State precedent interpreting *County of Yakima*, reasoning that an action to quiet title to Indian property is not impermissibly offensive

[1] Washington State law requires quiet title actions "to be brought against the tenant in possession [or] if there is no such tenant, then against the person claiming the title or some interest therein." Wash. Rev. Code § 7.28.010 (2017).

to tribal sovereignty because it is a "'less intrusive assertion of state jurisdiction' . . . than taxing and foreclosing" on Indian land. 389 P.3d at 573 (quoting *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 384–85 (Wash. 1996)). The court further reasoned that the exercise of *in rem* jurisdiction over such land is consistent with tribal sovereign immunity because it does not have "the potential to deprive any party of land [it] rightfully own[s]." 389 P.3d at 573–74 (quoting *Smale v. Noretep*, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009)). Having concluded that tribal sovereign immunity was not a bar to the exercise of *in rem* jurisdiction affecting the Tribe's real property rights, the court held that the Tribe was not a necessary party under Washington Civil Rule 19. The court concluded that the Lundgrens would prevail on their adverse possession claim and, accordingly, the Tribe had no protectable interest at stake—though it acknowledged that "this analysis seems, in a way, to put 'the cart before the horse.'" 389 P.3d at 574–75.

10. Justice Stephens, joined by Chief Justice Fairhurst and Justices Madsen and Gordon McCloud, dissented. The dissenters found that the majority had given "insufficient weight to the sovereign status of the Tribe and erroneously reach[ed] and discount[ed] the merits of [the Tribe's] claims." *Id.* at 577 (Stephens, J., dissenting) (citation omitted) (internal quotation marks omitted). The dissent stated it would have held that the Tribe was a necessary and indispensable party that could not be joined in the quiet title action, necessitating dismissal of the case. *Id.* The dissent noted that the Washington Supreme

Court's opinion in *Anderson & Middleton Lumber Co.*, 929 P.2d 379, which informed the majority's holding in this case, may "rest[] on a misreading of *County of Yakima*," that "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Id.* at 578 n.1.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. As "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), Indian tribes enjoy sovereign immunity from suit, subject only to waiver by the tribes or unequivocal abrogation by Congress, *Bay Mills*, 134 S. Ct. at 2030–31.

Contrary to this settled rule of sovereign immunity, the Washington Supreme Court held the Lundgrens' quiet title action could proceed because it was an *in rem* action. *Lundgren*, 389 P.3d at 574. This ruling would create a third exception to tribal sovereign immunity for *in rem* actions. *Id.* The Washington Supreme Court cannot create such an exception. "[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (citation omitted).

The Washington Supreme Court is not alone in its belief that there is a third exception to tribal sovereign immunity for actions *in rem*, but the

majority of courts faced with the question have declined to recognize such an exception.

II. The Washington Supreme Court's decision was based on multiple errors: (a) an erroneous interpretation of this Court's decision in *County of Yakima*, 502 U.S. 251; (b) a flawed reading of how tribal sovereign immunity may be limited; (c) a failure to appreciate that one purpose of sovereign immunity is to shield sovereigns from the burdens of litigation; and (d) a failure to recognize the significant sovereign interests in ownership and control of land.

A. The Washington Supreme Court cited this Court's decision in *County of Yakima* in support of its holding. *Lundgren*, 389 P.3d at 573. But this Court did not recognize an *in rem* exception to tribal sovereign immunity in *County of Yakima*. That case held that only Congress may authorize states to impose taxes on fee land within the exterior boundaries of a tribe's reservation. *See County of Yakima*, 502 U.S. at 258. The Court's passing mention of *in rem* jurisdiction in *County of Yakima* did not remotely suggest, much less hold, that there is an exception to tribal sovereign immunity to suit for *in rem* actions. *Id.* at 254–65.

B. The Washington Supreme Court opined that exercising *in rem* jurisdiction over property owned by an Indian tribe is less invasive of tribal sovereignty than other assertions of state jurisdiction that this Court has permitted such as taxing property owned by an Indian tribe. *Lundgren*, 389 P.3d at 573. But the degree to which a tribe's sovereignty is

invaded is not a basis for expanding exceptions to immunity. Only an Indian tribe (by waiver) or Congress (by legislation) may limit tribal sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2030–31. The Upper Skagit Indian Tribe has not waived its immunity to quiet title actions nor has Congress abrogated it.

C. The Washington Supreme Court concluded that subjecting property owned by an Indian tribe to *in rem* quiet title actions would not actually diminish tribal sovereignty because such actions merely apportion property according to all parties' legal rights: *i.e.*, the Tribe would not lose anything to which it was entitled. *Lundgren*, 389 P.3d at 573–74. But the shield of sovereign immunity protects against the burdens of litigation regardless of the merits of a claim. *See Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). The Tribe may not be subjected to an action that tests its title to the disputed property because being forced to defend its title is a central harm foreclosed by the immunity. The argument that immunity from suit vanishes if the party asserting it will lose on the merits would eradicate immunity from suit.

D. The Washington Supreme Court failed to recognize that a sovereign's interest in real property goes to the heart of the interests protected by immunity, *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–82 (1997), and that Indian tribes' interest in real property is a core interest.

III. Tribal sovereign immunity mandates dismissal of *in rem* actions involving tribal property. The Washington Supreme Court erred when it allowed adjudication of the Tribe's real property interests absent jurisdiction over the Tribe based on its ruling that the Tribe was not a necessary party for purposes of Washington Civil Rule 19. *Lundgren*, 389 P.3d at 572, 574–76. Regardless of the merits of the Washington Supreme Court's interpretation of Washington State law, it cannot apply that law in a way that undermines the federal law of tribal sovereign immunity. U.S. Const. art. VI, cl. 2. The Washington Supreme Court erred by permitting the Lundgrens' quiet title action to proceed in the face of the Tribe's sovereign immunity.

IV. Sovereign immunity is not defeated by a lack of alternative remedies for affected litigants, particularly in light of the right to seek remedial legislation from Congress, *see Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (citations omitted), but the Lundgrens were not without other means to protect their interests. The Lundgrens could have sought, but did not seek, to quiet title to the disputed property in the decades before the Tribe purchased the land in 2013. Even now, the Lundgrens could sue the seller of the property for purporting to sell land the seller (the Lundgrens' claim) did not own. The Washington State legislature could create a cause of action for money damages against those who purport to sell real property to which they do not have title. Finally, if the situation presented by this case merited legislative attention, Congress could fashion a

carefully tailored exception to sovereign immunity that would not require a wholesale exception for all actions brought *in rem*.

ARGUMENT

I. Federal Courts and Congress Have Long Recognized That Indian Tribes Retain Inherent Sovereign Immunity.

Tribal sovereignty predates the nation's founding. This Court has recognized that Indian tribes are "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 519 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001), and "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (recognizing Indian tribes as "domestic dependent nations"); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic." (citation omitted)). Because of their recognized status as separate sovereigns, the Constitution's Commerce Clause groups "Indian Tribes" alongside "foreign Nations" and "the several States." U.S. Const. art. I, § 8, cl. 3.

Sovereign immunity from suit is a "core aspect[] of sovereignty that tribes possess," *Bay Mills*, 134 S. Ct. at 2030 (citation omitted), and "a necessary corollary to Indian sovereignty and self-governance," *Three*

Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986) (citation omitted). *Cf.* The Federalist No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*").

Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (citation omitted). For over one hundred years, federal courts have recognized that only Congress (by abrogation) and the tribes (by waiver) may define the contours of tribal sovereign immunity. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2030 ("tribes possess—subject . . . to congressional action . . . the 'common-law immunity from suit traditionally enjoyed by sovereign powers'" (citations omitted)); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940) ("Indian Nations are exempt from suit without Congressional authorization." (citations omitted)); *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908) ("Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning."); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895) ("It has been the policy of the United States to place and maintain the . . . civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual.").

"Congress has consistently reiterated its approval of the immunity doctrine." *Okla. Tax Comm'n*, 498 U.S. at 510 (citations omitted). Congressional acts approving tribal sovereign immunity "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Id.* (citation omitted) (internal quotation marks omitted). The corollary is that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," and will find that Congress has abrogated immunity only if the "congressional decision" is "clear" and expressed "unequivocally." *Bay Mills*, 134 S. Ct. at 2031–32 (citations omitted) (internal quotation marks omitted).

The Washington Supreme Court's creation of a new exception to tribal sovereign immunity violated the basic principle that "tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756).

II. The Washington Supreme Court Erred in Recognizing an *in rem* Exception to Tribal Sovereign Immunity.

This Court has recognized only two exceptions to Tribal sovereign immunity: waiver and congressional abrogation. *Id.* at 2030–31. Here, the Tribe did not waive its immunity and Congress has not limited it.

The Washington Supreme Court held that the exercise of *in rem* jurisdiction to adjudicate ownership of property purchased by an Indian tribe was a third exception to Tribal sovereign immunity. *Lundgren*, 389 P.3d at 574 ("courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted"). The court based this holding on a misreading of *County of Yakima*, 502 U.S. at 255. This ruling is contrary to federal law.

A. This Court's Decision in *County of Yakima* Did Not Recognize an *in rem* Exception to Tribal Sovereign Immunity from Suit.

The Washington Supreme Court misunderstood this Court's holdings in *County of Yakima* and a prior case, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Neither case concerns sovereign immunity from suit, let alone supports an *in rem* exception to such immunity. Instead, both cases focus on tribal immunity from taxation and conclude that only Congress can authorize state taxation of reservation lands and Indians. *See County of Yakima*, 502 U.S. at 258 ("'[A]bsent cession of jurisdiction or other federal statutes permitting it' . . . a State is without power to tax reservation lands and reservation Indians." (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973))); *Moe*, 425 U.S. at 465, 475–76 (state taxation of Indian reservation lands or income "'is not permissible absent congressional consent'" (quoting *Mescalero Apache Tribe*, 411 U.S. at 148)). Tribal immunity from taxation and tribal immunity from suit are

distinct concepts, but under both doctrines, only Congress can limit a tribe's sovereignty and authorize the state action at issue. *See Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149, 156–59 (2d. Cir. 2010), *vacated and remanded on other grounds*, 562 U.S. 42 (2011).

In both *County of Yakima* and *Moe*, states argued that Congress had authorized a tax in the General Allotment Act of 1887 (GAA). *County of Yakima*, 502 U.S. at 258; *Moe*, 425 U.S. at 477. In *Moe*, the Court found that Congress had not authorized states to impose sales and property tax on Indians living and working on Indian reservations. 425 U.S. at 477–81. In *County of Yakima*, the Court found that Congress had authorized states "to impose . . . ad valorem property tax[es] on reservation land patented in fee." 502 U.S. at 270. Both cases required the Court to analyze the statutes at issue to determine whether Congress had clearly authorized states to impose a tax. Neither case recognized or even discussed an independent *in rem* exception to tribal sovereign immunity from suit.

The Washington Supreme Court's error arises from a passing reference to *in rem* jurisdiction in *County of Yakima* when the Court explained its justification for the differing applications of the GAA in that case and in *Moe*. *See County of Yakima*, 502 U.S. at 264–65 ("But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned.").

In *Moe*, the State of Montana imposed and sought to enforce certain sales and property taxes on members of Indian tribes residing or conducting business on reservation land. 425 U.S. at 465, 468–69. At issue was Section 6 of the GAA, which provides,

> [a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

Id. at 477 (quoting 25 U.S.C. § 349). The Court rejected the State's view that this statute was an express authorization for the disputed taxes, saying, among other things, that such a reading would create "an impractical pattern of checkerboard jurisdiction . . . contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction." *Id.* at 478 (citations omitted) (internal quotation marks omitted). The Court held, as it has in many other cases, that tribal sovereignty prohibits states from imposing taxes on Indian reservation lands or income absent clear authorization from Congress. *Id.* at 475–76.

This principle was also applied in *County of Yakima* with a different result—because the Court found that Congress had clearly acted to allow a specific tax, not on individual Indians as in *Moe*, but on certain Indian-owned land. 502 U.S. at 264–65.

Referring to *Moe*'s "checkerboard jurisdiction" language, the Court distinguished the earlier case by saying, "because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned." *Id.* at 265. An *in rem* tax on land often produces a "checkerboard" effect, but a "checkerboard" pattern of taxation of land, unlike the taxation of persons in *Moe*, was unobjectionable because it was consistent with congressional intent to limit tribal immunity from taxation. *Id.* at 262–65.

Thus, the use of the words "*in rem*" in *County of Yakima* does not remotely suggest the existence of the *in rem* exception to sovereign immunity from suit that the Washington Supreme Court embraced here. Rather, *County of Yakima* merely clarifies the jurisdiction to tax afforded to states pursuant to Section 6 of the GAA. *County of Yakima*, like *Moe* and every other relevant authority, recognized the need for unequivocal congressional action to overcome tribal sovereign immunity from taxation.

Nearly all courts that have considered the question have rejected the Washington Supreme Court's reading of *County of Yakima*. *E.g.*, *Cayuga Indian Nation of New York v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) ("we read no implied abrogation of tribal sovereign immunity from suit into" *County of Yakima*), *aff'g* 890 F. Supp. 2d 240, 247 (W.D.N.Y. 2012) ("[T]he Court disagrees that [*County of Yakima*] stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings."), *aff'd*,; *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (*County*

of Yakima "concerned the county's authority to tax certain fee patent parcels of land, located within the Yakima Reservation—and not . . . the tribe's amenability to suit in court based on a concept of an *in rem* exception to immunity" (citation omitted) (internal quotation marks omitted)); *Wis. Dep't of Nat. Res. v. Timber & Wood Prods. Located in Sawyer Cty.*, Appeal No. 2017AP181, 2017 WL 6502934, at *9 (Wis. Ct. App. Dec. 19, 2017) (publ'n decision pending) ("*Yakima* does not stand[] for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings." (alteration in original) (citation omitted) (internal quotation marks omitted); *Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, No. CV 15-02463-RGK (MANx), 2015 WL 12552060, at *3 (C.D. Cal. July 2, 2015) ("Plaintiff has failed to provide any binding authority to show that Congress abrogated the Tribe's immunity to in rem actions . . . . Unlike the present action, *Yakima* concerned an action by the local government pursuant to an *express abrogation* of tribal power by an act of Congress."); *First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) ("We do not agree with [the] assertion that *Yakima* . . . [is] authority that 'plainly demonstrate[s] that tribal sovereign immunity does not bar the exercise of *in rem* jurisdiction over tribal property, even when a tribe loses some part of that property as a result.'" (citation omitted)); *see also Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property."), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d

408 (2d Cir. 2011). *Contra Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W. 2d 685, 690–94 (N.D. 2002).

The majority position that there is no general *in rem* exception to tribal sovereign immunity from suit is consistent with settled federal law that there is no general *in rem* exception to state and federal sovereign immunity from suit. *See, e.g., United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists" (citation omitted)); *Zych v. Wrecked Vessel Believed to Be the Lady Elgin*, 960 F.2d 665, 669 (7th Cir. 1992) ("there is no general *in rem* exception to principles of sovereign immunity" (citation omitted)); *TransAmerica Assurance Corp. v. United States*, 423 F. Supp. 2d 691, 696 (W.D. Ky. 2006) ("[T]here is no general 'in rem' exception to the doctrine of sovereign immunity. Rather, the Supreme Court has excepted only two very specific types of *in rem* proceedings from sovereign immunity analysis: bankruptcy proceedings, and admiralty cases."). There is no reason to conclude there is a general *in rem* exception to tribal sovereign immunity but no general *in rem* exception to state or federal sovereign immunity.

It is no answer to say that sovereign immunity is not at issue because an *in rem* action "subject[s]" a tribe's *property*, rather than the *tribe itself*, "to suit." *Cf. Kiowa*, 523 U.S. at 754 ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity" (citations

omitted)). As this Court has previously recognized, "[t]he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (alteration in original) (quoting Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971)).

For purposes of sovereign immunity from suit, an assertion of jurisdiction over a sovereign's real property is an assertion of jurisdiction over the sovereign itself. *See United States v. Alabama*, 313 U.S. 274, 282 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States." (citation omitted)); *Stanley v. Schwalby*, 162 U.S. 255, 269–70 (1896) ("It is a fundamental principle of public law . . . that no suit can be maintained against the United States, or against their property, in any court, without express authority of congress." (citation omitted)); *Belknap v. Schild*, 161 U.S. 10, 16 (1896) ("The United States, however, like all sovereigns, cannot be impleaded in judicial tribunal, except so far as they have consented to be sued. . . . The same exemption from judicial process extends to the property of the United States . . . ."); *Carr v. United States*, 98 U.S. 433, 437–38 (1878) ("[W]ithout an act of Congress no direct proceeding can be instituted against the government or its property. . . . Otherwise, the government could always be compelled to come into court and litigate with private parties in defence of its property."); *The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."); *Cayuga*, 761

F.3d at 221 ("[W]e decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings . . . ."). Accordingly, "an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality opinion). Any other rule would allow sovereign immunity from suit to "easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*." *Id.*

No matter the form of action, adjudicating a non-consenting sovereign's real property rights requires an effective assertion of jurisdiction over the sovereign itself and necessarily implicates sovereign immunity from suit. Absent a valid exception to immunity, the action cannot proceed. This Court's decision in *County of Yakima* does not support the Washington Supreme Court's recognition of an *in rem* exception to tribal sovereign immunity absent clear congressional action authorizing such an exception.

B. Only Congress or an Indian Tribe May Limit a Tribe's Sovereign Immunity.

The Washington Supreme Court sought to buttress its conclusion that there is an *in rem* exception to sovereign immunity by opining that an action to quiet title to Indian land intrudes less on the tribe's sovereignty than other assertions of state jurisdiction that this Court has permitted, such as the taxation and foreclosure of fee lands permitted in

County of Yakima. *Lundgren*, 389 P.3d at 573. The court did not explain why *taking* ancestral land of which a tribe is a record owner is less "intrusive" than *taxing* it. But the question is irrelevant. Whether an exception to tribal sovereign immunity exists has nothing to do with how intrusive it is. The issue is authorization, which may be granted only through clear congressional action or tribal waiver. *See Bay Mills*, 134 S. Ct. at 2030–31 ("[W]e have time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." (citation omitted) (internal quotation marks omitted)).

The scope of the limitation on tribal sovereign immunity from a legitimate source (Congress or a tribe) is as broad as the source provides. *See Okla. Tax Comm'n*, 498 U.S. at 510 ("Congress has always been at liberty to dispense with such tribal immunity or to limit it."). But if the limitation comes from an illegitimate source, it is invalid no matter its scope. *See Bay Mills*, 134 S. Ct. at 2030–31. In this case, neither the Upper Skagit Indian Tribe nor Congress authorized state courts to exercise *in rem* jurisdiction over the Tribe's land in quiet title actions. Accordingly, the Tribe remains immune from suit to quiet title to its land.

C. A State's Exercise of *in rem* Jurisdiction over Property Acquired by an Indian Tribe Works an Impermissible Diminution of the Tribe's Sovereignty.

The Washington Supreme Court's third justification for the exercise of *in rem* jurisdiction over property purchased by a federally recognized Indian tribe is that, because the action will merely determine the tribe's legal rights, it does not actually burden or invade tribal sovereignty. According to the court, "a state court in rem action . . . does nothing more than divide [land] among its legal owners according to their relative interests," and does not have "the potential to deprive any party of land [it] rightfully own[s]." *Lundgren*, 389 P.3d at 573–74 (citations omitted).

In other words, the Washington court asks, "What do you need sovereign immunity for? If you are right, you will win the case." Of course, the same can be said of any legal action against an Indian tribe or any other sovereign. Apart from the logical fallacy of looking to the outcome of the case to decide whether the case can be brought—what the state court itself called putting "the cart before the horse," 389 P.3d at 575—this reasoning overlooks the fundamental reason why sovereigns are immune from suit.

Sovereign immunity protects sovereigns from the burdens of litigation in the interest of preserving sovereign dignity, *Alden v. Maine*, 527 U.S. 706, 715, 749 (1999), protecting public resources, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and maintaining self-governance, *Ex parte Ayers*, 123

U.S. 443, 505 (1887). Immunity would be eviscerated if the action had to be heard on the merits to determine if immunity existed, and immunity limited to suits without merit would be no immunity at all. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("[W]e must first determine whether the Band has effectively waived tribal immunity—thus making it amenable to suit in federal court—irrespective of the merits of [plaintiff's] tort and contractual claims."); *Koehler*, 153 F.3d at 267 ("At its core, sovereign immunity deprives the courts of jurisdiction irrespective of the merits of the underlying claim."); *Foremost-McKesson, Inc.*, 905 F.2d at 443 ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits" (citation omitted)).

The Tribe is the record owner of this property, and its title may not be tested without its consent or congressional authorization.

D. All Sovereigns, and Particularly Indian Tribes, Have Interests in Ownership and Control of Their Land Protected by Sovereign Immunity.

The assertion of *in rem* jurisdiction over land poses a significant threat to sovereign interests. Accordingly, state sovereign immunity bars actions targeting state real property interests. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491,

506 (1998) ("the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests");[2] *Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." (citations omitted)). The federal government has a similar interest in protecting federal land. While the United States has waived its sovereign immunity to some quiet title actions, it has retained its immunity to adverse possession claims, *see* 28 U.S.C. § 2409a(a), (n) (2017).

In *Coeur d'Alene Tribe*, the Coeur d'Alene Tribe sued state officials seeking a "permanent injunction prohibiting [the officials] from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands" of

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[2] *Deep Sea Research* held that an *in rem* admiralty action could proceed against a *res* not in the State's possession. *Id.* at 507–08. The Court explicitly acknowledged the limited applicability of this carve-out, which is rooted in admiralty law. *Id.* (holding that the "longstanding precedent respecting the federal courts' assumption of in rem admiralty jurisdiction over vessels that are not in the possession of a sovereign" meant "that the Eleventh Amendment does not bar" *in rem* jurisdiction over a shipwrecked vessel); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 461 (2004) (Thomas, J., dissenting) ("our holding in *Deep Sea Research* was limited to actions where the res is not within the State's possession"). It has no applicability to real property of which the sovereign has recorded title.

Lake Coeur d'Alene based on a prior executive order. 521 U.S. at 264–65. The Court noted that while "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the [*Ex parte*] *Young* fiction," and thereby avoid the state's sovereign immunity defense, "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. *See generally Ex parte Young*, 209 U.S. 123 (1908). If the Tribe prevailed, "substantially all benefits of ownership and control would shift from the State to the Tribe," and the state's "sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 281–82, 287.

While the Court's decision was grounded in state immunity under the Eleventh Amendment, *id.* at 287–88, its reasoning is equally applicable to tribal sovereign immunity. The Court has

> sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the

> ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713. Just as the State's immunity from suit in *Coeur d'Alene Tribe* was based on the State's inherent sovereignty, Indian tribes' immunity from suit is derived from their inherent sovereignty. *See Bay Mills*, 134 S. Ct. at 2030–31 (citations omitted). While the doctrines of tribal sovereign immunity and state sovereign immunity are not identical,[3] their historical origins and justification are similar. There is no principled basis to distinguish between the two immunities with respect to sovereign interests in land. Whether the sovereign is a state or an Indian tribe, suits seeking title to, or functional control over, sovereign land implicate sovereign interests and are subject to sovereign immunity.

The plaintiffs in *Coeur d'Alene Tribe* and in this matter both brought suits directly implicating sovereign interests and both claimed an exception to sovereign immunity. In *Coeur d'Alene Tribe*, the exception was the *Ex parte Young* doctrine: a suit seeking prospective relief from state officials, rather than the state itself. 521 U.S. at 266. The Court rejected application of the *Ex parte Young* exception

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[3] For example, states mutually surrendered their sovereign immunity from suits filed by each other at the Constitutional Convention, but Indian tribes and states made no such mutual concession. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

because the relief sought against state officials implicated sovereign interests in the ownership and control of land. *Id.* at 281–82, 287–88. Similarly, in this matter, the Lundgrens seek an exception to the Upper Skagit Indian Tribe's sovereign immunity by bringing an *in rem* action to quiet title to disputed property. The Court should reject this exception for the same reason it did in *Coeur d'Alene Tribe*: despite the form of the suit, the substance of the suit implicates sovereign interests in the ownership and control of land.

Moreover, Indian tribes have an acute interest in maintaining ownership and control of their land, especially in light of the history of such land being taken from tribes, often with the very purpose of undermining tribal sovereignty. *See, e.g., County of Yakima*, 502 U.S. at 254 ("The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.").[4]

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[4] The Tribe purchased the land at issue with the intention of taking the land into trust pursuant to 25 C.F.R. §§ 151.10–.11. *See infra* at 6, paras. 3–4. As part of this process, the Tribe must provide the Department of the Interior with title insurance for the relevant property. In the Tribe's experience, all title insurance policies contain an exception for claims such as adverse possession, to which the Department of the Interior has not previously objected. If the Tribe prevails here, it expects to be able to take the land into trust based on this past experience and on the effect of a favorable ruling for the tribe: *i.e.*, such a ruling would effectively extinguish the Lundgrens' adverse possession claim and clarify that sovereign immunity would bar other adverse possession claims.

III. Once a Tribe Invokes Sovereign Immunity from Suit, Courts May Not Adjudicate Tribal Rights and Interests in the Absence of the Tribe.

The Washington Supreme Court recognized that the Upper Skagit Indian Tribe could not be joined in the Lundgrens' quiet title action against its will. *Lundgren*, 389 P.3d at 572. But, having concluded that the court had *in rem* jurisdiction over the disputed property, the court then held that the Tribe was not a necessary party under Washington Civil Rule 19. *Id.* at 574–76. The court based this holding on its finding that the Tribe had no legally protected interest at stake, a finding it made by analyzing the merits of the dispute and determining the Lundgrens had a superior claim to the disputed property via adverse possession. *Id.* at 575–76. As the majority below conceded, this analysis put "the cart before the horse." *Id.* at 575. In fact, there is no horse. The court lacked the power to proceed.

Before a court can resolve the merits of a dispute, it must have jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation omitted)). Sovereign immunity from suit deprives courts of jurisdiction. *See Meyer*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature."); *Alvarado v. Table*

Mountain Rancheria, 509 F.3d 1008, 1015–16 (9th Cir. 2007) ("tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe"). Accordingly, once a tribe invokes its sovereign immunity from suit and deprives the court of jurisdiction, the suit must be dismissed.

Sovereign immunity from suit would be effectively eradicated under the Washington Supreme Court's reasoning. Immunity could be avoided by simply dismissing the sovereign from the case or omitting to join the sovereign while adjudicating the sovereign's rights in its absence. Jurisdiction is a prerequisite to a determination on the merits, not the other way around.

The Washington Supreme Court is the final authority on Washington State law, including Washington Civil Rule 19, but it may not invoke state rules governing joinder of parties in a way that defeats sovereign immunity in violation of federal law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

"[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). When a sovereign Indian tribe's legal rights are directly implicated in an action and the tribe invokes its immunity from suit, it does not matter whether the action is *in personam* or *in rem*. The action cannot proceed without the tribe's consent or clear congressional abrogation of the tribe's immunity from suit.

This Court confronted a similar issue in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). That case arose from an interpleader action to resolve disputed ownership of property. *Id.* at 854–55. The Republic of the Philippines was named in the suit, invoked its sovereign immunity, and sought dismissal of the action. *Id.* at 855, 859. The District Court dismissed the foreign sovereign, but permitted the action to proceed to judgment in its absence. *Id.* at 860. The Court of Appeals subsequently held that while the Republic of the Philippines was a required or necessary party, its claim was so unlikely to prevail on the merits that the action could proceed in its absence. *Id.* This Court reversed, finding that the lower courts had not given "full effect to sovereign immunity." *Id.* at 865. The Court held:

> A case may not proceed when a required-entity sovereign is not amenable to suit. . . . [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where

> there is a potential for injury to the interests of the absent sovereign.

Id. at 867. The analysis is no different here. The Lundgrens filed an *in rem* action to resolve disputed ownership of property and named the Tribe as a defendant. The Tribe invoked its sovereign immunity from suit, sought dismissal of the action, is the record owner of the disputed land, and disputes the validity of the Lundgrens' adverse possession claim on the merits. To "give full effect to" the Tribe's "sovereign immunity" from suit, *Pimentel*, 553 U.S. at 865, the Lundgrens' quiet title action must be dismissed.

IV. The Lundgrens Had and Continue to Have a Means to Seek Redress for Their Claim.

This Court has accepted that tribal sovereign immunity may leave a litigant without a remedy short of congressional action. *Okla. Tax Comm'n*, 498 U.S. at 514 (plaintiffs "may of course seek appropriate legislation from Congress"); *see Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *cf. Pimentel*, 553 U.S. at 872 ("Dismissal . . . will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity.").

But, here, the Lundgrens *did* have a remedy; they chose not to exercise it. They claimed below to have

"acquired title by adverse possession decades before" the Tribe purchased the property in 2013. Brief for Respondent at 1, *Upper Skagit Indian Tribe v. Lundgren*, No. 91622-5 (Wash. Nov. 2, 2015), 2015 WL 10438674, at *1. Indeed, they argued that between 1947 and 2013, either they or their predecessors had continually used the property in the manner required to obtain title by adverse possession. *Id.* at *7–18. For fifty-six years, they elected to do nothing to confirm their title. *See Halverson v. City of Bellevue*, 704 P.2d 1232, 1234 (Wash. Ct. App. 1985) ("the merit of an adverse possession claim cannot be determined . . . prior to adjudication").

Even now, they have a remedy. Washington law recognizes a claim for money had and received and a claim for unjust enrichment, either of which the Lundgrens could bring against the seller of the property who, they claim, sold the property without the right to do so. *See Coast Trading Co., Inc. v. Parmac, Inc.*, 587 P.2d 1071, 1075 (Wash. Ct. App. 1978) (noting that an action for "money had and received . . . is looked upon with favor by the courts and is liberally applied" (citation omitted)); *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008) ("Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." (citation omitted)). The Washington State legislature also could address the Lundgrens' situation by creating a specific cause of action for money damages against those who, without valid title, purport to dispose of property.

Finally, the Lundgrens "may of course seek appropriate legislation from Congress." *Okla. Tax Comm'n*, 498 U.S. at 514. This Court has repeatedly acknowledged that it would be improper for the federal courts to judicially abrogate tribal sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." (citations omitted)); *Kiowa*, 523 U.S. at 759–60 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. . . . [W]e decline to revisit our case law and choose to defer to Congress."); *Okla. Tax Comm'n*, 498 U.S. at 510 ("Congress has always been at liberty to dispense with . . . tribal immunity or to limit it . . . [and] has consistently reiterated its approval of the immunity doctrine . . . . [W]e are not disposed to modify the long-established principle of tribal sovereign immunity.").

Congress has been active and diligent in carrying out its powers and responsibilities in this area. It has repeatedly considered and enacted various limits on tribal sovereignty:

> Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular—drafted by the

> chair of the Senate Appropriations Subcommittee on the Interior—expressly referred to *Kiowa* and broadly abrogated tribal immunity for most torts and breaches of contract. But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval. Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others.

Bay Mills, 134 S. Ct. at 2038 (citations omitted).

The Lundgrens asserted a claim for relief to which they are not entitled, but they had and have other means of redress: they could have sought to quiet title in the decades prior to the Tribe's purchase or sued the seller for money damages after the Tribe's purchase. If that outcome is unwise or unjust, Congress has the power and institutional resources "to weigh and accommodate the competing policy concerns" and craft a legislative response. *Kiowa*, 523 U.S. at 759. The Lundgrens are not without recourse.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

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No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE, PETITIONER

v.

SHARLINE LUNDGREN AND RAY LUNDGREN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars a state court's exercise of *in rem* jurisdiction in an action to quiet title to off-reservation land in which the tribe claims a property interest.

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In the Supreme Court of the United States

No. 17-387

UPPER SKAGIT INDIAN TRIBE, PETITIONER

v.

SHARLINE LUNDGREN AND RAY LUNDGREN

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet. App. 1a-38a) is reported at 187 Wash. 2d 857 and 389 P.3d 569. The order of the Washington Superior Court (Pet. App. 39a-40a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on February 16, 2017. A motion for reconsideration was denied on June 12, 2017 (Pet. App. 41a). The petition for a writ of certiorari was filed on September 11, 2017 (Monday), and was granted on December 8, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

INTRODUCTION

At the core of sovereignty is the authority to adjudicate disputes over land within the sovereign's territory. The State of Washington has exercised that authority by granting its courts *in rem* jurisdiction to hear quiet-title actions involving real property in Washington. Respondents Sharline and Ray Lundgren have invoked that jurisdiction to resolve a boundary dispute with their neighbor.

The Lundgrens' neighbor is the Upper Skagit Indian Tribe. The Tribe's land is not and never has been part of a reservation; the Tribe purchased it on the open market in 2013. The land has not been put into trust, and it is subject to Washington's jurisdiction just like any other land in the State. But the Tribe argues that its sovereign immunity bars this action. In making that argument, the Tribe seeks an expansion of immunity that would leave landowners like the Lundgrens without a meaningful remedy to protect their property rights.

If the Lundgrens' neighbor were a foreign country or another State that had purchased land in Washington, sovereign immunity would not apply here. As the United States acknowledges, it is settled law that a sovereign may not assert immunity in the courts of another sovereign to bar an action involving land that it owns within the forum sovereign's territory. The Tribe does not explain why it should enjoy a broader immunity. To the contrary, it argues that tribes should be treated like other sovereigns. That principle resolves this case.

This Court should affirm the decision below and hold that tribal sovereign immunity does not bar a state court's exercise of *in rem* jurisdiction in an action to quiet title to off-reservation land.

STATEMENT

1. The Lundgrens live in Bow, Washington, an unincorporated community approximately 60 miles north of Seattle. Their home is located on a parcel of land that they have owned since 1981 and that has belonged to their extended family since 1947. The northern edge of the property is marked by a barbed-wire fence, which has been maintained in its present location since at least 1947. Pet. App. 2a-3a.

The Upper Skagit Indian Tribe is a federally recognized Indian tribe in Washington. In the Treaty of Point Elliott in 1855, the Tribe's predecessors and other Indian tribes in the region agreed to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them" in what is now northwestern Washington. Treaty of Point Elliott, art. 1, Jan. 22, 1855, 12 Stat. 927; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 n.2 (1979). The United States set aside several tracts of land as reservations for the signatory tribes. Treaty of Point Elliott, art. 2, 12 Stat. 928. In 1981, the federal government established a separate reservation for the Tribe. 46 Fed. Reg. 46,681 (Sept. 21, 1981).

In an open-market transaction in 2013, the Tribe purchased a parcel of land immediately north of the Lundgrens' property. That parcel was not previously part of a reservation or held in trust status. Soon after purchasing the land, the Tribe conducted a survey establishing that the barbed-wire fence was about 20 to 40 feet north of the recorded boundary between the Tribe's and the Lundgrens' properties. Pet. App. 3a; J.A. 38. After clearcutting the area on its side of the fence, the

Tribe informed the Lundgrens that it intended to tear down the fence, clearcut the entire disputed strip of land, and install a new fence where the Tribe thought it belonged. J.A. 20.

2. In response, the Lundgrens brought this quiet-title action against the Tribe in the Washington Superior Court, claiming title to the land south of the fence by virtue of adverse possession and mutual acquiescence. Pet. App. 4a; J.A. 11-16. In their complaint, they asked the court to order that their "title to the Disputed Property be established and quieted in them, terminating any inconsistent claim" by the Tribe. J.A. 15.

The Lundgrens moved for summary judgment. Pet. App. 4a. They argued that the 10-year statute of limitations for an ejectment action had expired—and thus their title to the disputed land had vested—years before the Tribe purchased the adjoining property. See Wash. Rev. Code § 4.16.020. In support of their motion, they presented photographic evidence of the age of the fence. J.A. 23. They also submitted declarations establishing that their family had regularly harvested timber and cleared brush on their side of the fence; that they had maintained the fence; that the Tribe's predecessor in interest, Annabell Brown, had "never disputed [the Lundgrens'] ownership of the fence or the land south of the fence"; and that both Brown and the Lundgrens had "relied on the fence as the boundary marker." J.A. 18-19; see also J.A. 26-27. The Tribe moved to dismiss, arguing that it was not subject to state-court jurisdiction in the absence of a waiver of its sovereign immunity. Pet. App. 4a.

The trial court denied the motion to dismiss and granted summary judgment to the Lundgrens. Pet.

App. 5a. In its ruling on summary judgment, the court stated that "this is as clear * * * a case" of adverse possession "as I've had on the bench." *Ibid.*

3. The Washington Supreme Court affirmed. Pet. App. 1a-38a.

a. The Washington Supreme Court observed that a quiet-title action is a proceeding *in rem* that does not require a court to have personal jurisdiction over the defendant. Pet. App. 7a-8a. It held that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." *Id.* at 8a. In reaching that conclusion, the court relied on this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), which permitted Yakima County to impose taxes on fee-patented reservation land that had been repurchased by the original tribal owner. Noting that this Court had "characteriz[ed] the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakima nation," the Washington Supreme Court explained that this Court had upheld "jurisdiction to tax on the basis of alienability of allotted lands, and not on the basis of jurisdiction over tribal owners." Pet. App. 8a-9a. Similarly, "[b]ecause courts exercise in rem jurisdiction over property subject to quiet title actions," the court concluded that "transferring the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the property," and the exercise of such jurisdiction "for the purposes of determining ownership does not offend the Tribe's sovereignty." *Id.* at 10a-11a (quoting *Smale* v. *Noretep*, 208 P.3d 1180, 1180 (Wash. Ct. App. 2009)).

The Washington Supreme Court further held that the Tribe was not a necessary and indispensable party under Washington Civil Rule 19, which parallels Federal Rule of Civil Procedure 19. Pet. App. 11a-18a. The court reasoned that the Tribe was not a necessary party because the Lundgrens' "title to the land was acquired long before the Tribe purchased the adjacent land." *Id.* at 15a. And it concluded that the Tribe was not an indispensable party because there was "no alternative judicial forum for the Lundgrens," so allowing the Tribe to "wield[] sovereign immunity as a sword" would "run[] counter to the equitable purposes underlying compulsory joinder." *Id.* at 17a-18a.

b. Justice Stephens dissented, joined by three other Justices. Pet. App. 19a-38a. She argued that "the Tribe is a necessary and indispensable party that cannot be joined" because of sovereign immunity, and that the court "should dismiss this case without reaching the merits of the Lundgrens' claims." *Id.* at 20a.

SUMMARY OF ARGUMENT

This Court has held that a State has *in rem* jurisdiction over actions involving title to land within its sovereign territory. That jurisdiction reflects the State's "interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property." *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977) (footnote omitted).

This case involves a dispute over title to land in Washington. Although the Tribe argues that it has sovereignty over the land, it does not. The Tribe's sovereignty over the land was extinguished by treaty more than 150 years ago. The land has never been within any

reservation, nor has it ever been placed into federal trust status. Instead, the Tribe purchased the land in an open-market transaction shortly before this litigation began. Under *City of Sherrill* v. *Oneida Indian Nation of New York*, such a purchase does not allow a tribe to "unilaterally revive its ancient sovereignty." 544 U.S. 197, 203 (2005). The State of Washington, not the Tribe, is the sovereign with jurisdiction over the disputed land.

In attempting to demonstrate that it is nevertheless entitled to sovereign immunity, the Tribe asserts that sovereign immunity always bars an action against property in which a sovereign claims an interest. That is incorrect. Since at least the eighteenth century, it has been a settled rule of international law that a sovereign may not assert immunity in the courts of another sovereign to bar an action relating to immovable property that it owns within the forum sovereign's territory. That rule is equally well established as a limitation on the sovereign immunity of States. See *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924). As the United States acknowledges, if the land at issue were claimed by a foreign nation or by another State, instead of by the Tribe, sovereign immunity would not bar this action.

The Tribe does not explain why tribes should enjoy an immunity rule broader than that of foreign nations and States. To the contrary, it expressly asserts that tribes should be treated the same as other sovereigns. And while the United States attempts to demonstrate that tribal immunity should extend more broadly than other forms of sovereign immunity, its efforts are unavailing. Because "common-law sovereign immunity principles" would not allow other sovereigns to assert immunity in these circumstances, the Tribe should not

be permitted to do so either. *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017).

Allowing the Tribe to assert sovereign immunity in this case would require significantly expanding the doctrine of tribal sovereign immunity—essentially treating tribes as "super-sovereign[s]." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995). Such an expansion is not justified by this Court's precedents. It is also unnecessary to protect tribal interests; to the extent that tribes believe they require greater security of land title than is available to others, they can ask the United States to acquire land in trust for them. On the other hand, expanding immunity would impair the States' sovereign interest in adjudicating disputes over title to land within their territory and would frustrate the orderly adjudication of competing claims of ownership.

Finally, extending tribal sovereign immunity to these circumstances would harm landowners like the Lundgrens, who have "not chosen to deal with a tribe" but now find themselves with "no alternative way to obtain relief" for the Tribe's off-reservation activity. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 n.8 (2014). The Tribe has created a cloud on the Lundgrens' title to their land, and that cloud is a concrete injury for which Washington law provides a remedy. Accepting the Tribe's assertion of immunity would make that remedy unavailable while leaving the Lundgrens and others like them no practical alternative.

ARGUMENT

A. A State has *in rem* jurisdiction over actions involving land within its sovereign territory

As the Washington Supreme Court emphasized in the decision below, an action to quiet title is a proceeding *in rem*. Pet. App. 7a; see *Phillips* v. *Tompson*, 131 P. 461, 463 (Wash. 1913). Unlike an *in personam* action, which is based on the court's "authority over the defendant's person," an *in rem* action is "based on the court's power over property within its territory." *Shaffer* v. *Heitner*, 433 U.S. 186, 199 (1977). In an *in rem* action, the judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Ibid.*

Under the traditional, territorially limited understanding of jurisdiction reflected in this Court's decision in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), a state court generally could not exercise *in personam* jurisdiction over nonresident defendants. If a State were unable to exercise *in rem* jurisdiction, it would lack the ability to adjudicate title disputes involving a nonresident. See *Arndt* v. *Griggs*, 134 U.S. 316, 320 (1890). As this Court has recognized, however, "[t]he well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." *Id.* at 321. To that end, a State may exercise *in rem* jurisdiction "over property within its limits" and may provide that "the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the

modes of establishing titles thereto." *Id.* at 320-321; accord *Phillips*, 131 P. at 464.

This Court has since departed from *Pennoyer*'s strict territorial understanding of personal jurisdiction. See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). But under the modern approach, state courts retain the authority to exercise *in rem* jurisdiction in cases—such as quiet-title actions—"when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant." *Shaffer*, 433 U.S. at 207. Such jurisdiction, this Court has explained, remains necessary to protect "[t]he State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property." *Id.* at 208 (footnote omitted). Washington courts may therefore exercise *in rem* jurisdiction over an action involving title to real property located within Washington's territory, even if the defendant would not otherwise be subject to personal jurisdiction.

B. This case involves the ownership of land within the sovereign territory of the State of Washington

In evaluating whether the Washington courts have authority to adjudicate this case, the starting point in the analysis is that the land is located within Washington. The Tribe attempts to obscure that fact, referring (Pet. Br. 30) to the disputed property as its "sovereign land" and complaining (Pet. Br. 11) that this action threatens its "significant sovereign interests in ownership and control of [that] land." That is incorrect.

The Tribe has not exercised sovereignty over the land since 1855, when it agreed to "cede, relinquish, and convey" all of its "right, title, and interest in and to the lands" at issue here. Treaty of Point Elliott, art. 1, Jan. 22, 1855, 12 Stat. 927; see *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1080 (2016) (describing similar language as terminating tribal jurisdiction "in unequivocal terms") (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 504 (1973)). The federal government established a reservation for the Tribe in 1981, but the land at issue here is not—and never has been—part of a reservation or otherwise held in trust. See 46 Fed. Reg. 46,681 (Sept. 21, 1981).

The Tribe's interest in the land is based solely on an open-market purchase less than two years before this litigation began. That purchase did not reestablish the Tribe's sovereignty over the land. In *City of Sherrill* v. *Oneida Indian Nation of New York*, this Court held that a tribe "cannot unilaterally revive its ancient sovereignty, in whole or in part" simply "through open-market purchases from current titleholders." 544 U.S. 197, 203 (2005). At issue in *City of Sherrill* were lands within the historic boundaries of the Oneida Reservation in New York State. *Id.* at 211. The Oneida Nation alleged that the lands had been unlawfully acquired from it many years before, and it reacquired them through open-market transactions. *Ibid.* But the Court squarely rejected the Oneida Nation's argument that it had thereby "unified fee and aboriginal title and [could] now assert sovereign dominion over the parcels." *Id.* at 213; accord *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379, 388 (Wash. 1996) ("[T]hat the property is now owned in part by a federally recognized Indian tribal nation does not change" its subjection to

state jurisdiction "because the alienable fee status of the land continues * * * even if reacquired by an Indian Nation.").

That conclusion applies with even greater force here. Unlike the private lands purchased in *City of Sherrill*, the property at issue here was never part of a reservation, and there is no dispute that the Tribe's sovereignty over the disputed property was validly extinguished under federal law. It also is undisputed that sovereignty, jurisdiction, and regulatory authority over the property have been exercised by the State of Washington ever since that State was admitted to the Union "on an equal footing with the original States." Act of Feb. 22, 1889, § 8, ch. 180, 25 Stat. 679. *City of Sherrill* therefore bars any claim of tribal sovereignty over the property.

C. Sovereign immunity does not bar actions relating to immovable property held by one sovereign in the territory of another sovereign

In arguing that it is entitled to immunity, the Tribe begins with the premise that "[a]ll sovereigns * * * have interests in ownership and control of their land protected by sovereign immunity." Pet. Br. 27 (capitalization omitted). That premise is incorrect because it omits a critical qualification: A sovereign may not assert immunity to bar an action in the courts of another sovereign involving interests in land that it owns within the forum sovereign's territory. Sometimes referred to as the "immovable-property rule," that limitation has long been recognized in the context of foreign sovereign immunity and the sovereign immunity of the States. As the United States correctly acknowledges (Gov't Br. 25), "if [the Lundgrens'] suit had been brought against a for-

eign state or a sister state that had purchased real property in Washington, sovereign immunity would not bar the suit."

1. Foreign nations are not immune from actions relating to immovable property in the United States

International law has long recognized that when a foreign state owns real property outside its jurisdiction, it "must follow the same rules as everyone else." *City of New York* v. *Permanent Mission of India*, 446 F.3d 365, 374 (2d Cir. 2006), aff'd, 551 U.S. 193 (2007); accord Restatement (Third) of Foreign Relations Law of the United States § 455(1)(c) (1987). Since at least the eighteenth century, it has been "established that property which a prince has purchased for himself in the dominions of another * * * shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes." Cornelius van Bynkershoek, *De Foro Legatorum* 22 (Gordon J. Laing trans. 1946) (1744).

The rationale for the traditional limitation on the scope of foreign sovereign immunity is the same as that underlying *in rem* jurisdiction more generally: Because "[t]he well-being of every community requires that the title to real estate therein shall be secure," a state may demand that "the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." *Arndt*, 134 U.S. at 320-321. As then-Judge Scalia explained, it is "self-evident" that "[a] territorial sovereign has a primeval

interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985). The authority to protect that "primeval interest" resides "in the nature of sovereignty," which demands that "[e]very government [have] the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries." *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823); see Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566, 567 (1928) ("[R]ights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them."); 1 Francis Wharton, *Conflict of Laws* 636 (3d ed. 1905) ("A sovereignty cannot safely permit the title to its land to be determined by a foreign power.").

This Court first recognized the unavailability of sovereign immunity in immovable-property cases in *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, the Court relied on van Bynkershoek in observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting the property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Id.* at 145. That observation was consistent with a uniform body of international-law commentary before and since. See, *e.g.*, 3 Emer de Vattel, *The Law of Nations* 139 (Charles G. Fenwick trans. 1916) (1758) ("[S]everal sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold

them after the manner of private individuals."); accord H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 (1951) ("There is uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property."); 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 n.33 (2d ed. 1945) ("All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals, whether as defendants or as plaintiffs.") (internal quotation marks omitted); Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 (1931) (collecting cases).

Congress also has recognized that sovereign immunity does not extend to cases involving real property held by one sovereign in the territory of another. In the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, Congress expressly provided that immunity does not extend to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). As this Court has explained, that provision did not represent a change in the law but rather was intended "to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 200 (2007) (quoting *Asociacion de Reclamantes*, 735 F.2d at 1521); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976); Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965).

2. States are not immune from actions relating to immovable property in other States

It is equally well settled that a State's sovereign immunity does not bar actions involving title to land held by the State in another State. This Court established that principle in *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924). In that case, the State of Georgia had purchased land in Chattanooga, Tennessee, and when the city sought to condemn part of the land for use as a street, Georgia asserted that its sovereign immunity barred the city's action. *Id.* at 478-479. In language echoing that of van Bynkershoek, this Court rejected that assertion, explaining that "[l]and acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership." *Id.* at 480. The Court emphasized that because "[t]he sovereignty of Georgia was not extended into Tennessee," Georgia's "property there is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee." *Id.* at 481-482.

State courts have applied the same principle in rejecting other States' claims of immunity from actions involving land within the forum State. See, *e.g.*, *People* v. *Streeper*, 145 N.E.2d 625, 629 (Ill. 1957) (holding that a State or its municipality owning property in Illinois "occupies the same position here as a private entity"); *State* v. *City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) ("[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. * * * To all intents and purposes, ownership by a state of property located in another state is the same as that of a private

corporation."); cf. *Burbank* v. *Fay*, 65 N.Y. 57, 62 (1875) ("When one State holds lands within the limits of another State, it acquires its estate subject to all the incidents of ordinary ownership."). A contrary rule, courts have explained, would have the anomalous result of allowing a State to create "a separate island of sovereignty" by purchasing land in another State. *Streeper*, 145 N.E.2d at 630.

3. The Tribe errs in relying on cases involving land held by a sovereign within its own territory

The Tribe cites various cases for the proposition that sovereign immunity bars actions involving property held by a sovereign. Those cases have no application here. To the extent that they involve land rather than other forms of property, they involve land held by a sovereign within its own territory, rather than land held in the territory of another sovereign.

For example, the Tribe relies heavily (Pet. Br. 28-31) on *Idaho* v. *Coeur d'Alene Tribe of Idaho*, in which this Court held that the Eleventh Amendment barred an action against Idaho officials seeking "the functional equivalent" of quieting title to the submerged lands of Lake Coeur d'Alene in the Coeur d'Alene Tribe, notwithstanding the State of Idaho's claim to those lands. 521 U.S. 261, 282 (1997). Lake Coeur d'Alene, of course, is located within the State of Idaho, a fact that this Court emphasized when it explained that the requested relief "would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." *Ibid.* Likewise, state courts have held that a State enjoys sov-

ereign immunity in an action challenging its title to land within the State. See, *e.g.*, *State* v. *Superior Court*, 94 P.2d 505 (Wash. 1939). Those cases have no bearing on the availability of immunity in actions involving land held by a State within another State.

Similarly inapposite are cases involving land held by the United States within the United States. Given the federal government's supremacy over all other sovereigns within its borders, see U.S. Const. art. VI, cl. 2, it is not surprising that the United States may assert sovereign immunity in cases involving land in which it claims an interest, even if those cases are brought by States. See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273 (1983); *United States* v. *Alabama*, 313 U.S. 274 (1941); *Minnesota* v. *United States*, 305 U.S. 382 (1939). Those cases do not suggest that the United States would be immune from suit in the courts of another country in which it owned land. To the contrary, the consistent position of the United States has been that it would not be immune in those circumstances. See U.N. GAOR, 59th Sess., 6th Comm., 13th mtg. at 10, U.N. Doc. A/C.6/59/SR.13 (Oct. 25, 2004) (statement of Eric Rosand, Deputy Legal Adviser, U.S. Mission to the U.N.) (stating the position of the United States that the unavailability of immunity "with respect to rights or interests in real property within [a] foreign State" is "widely recognized and [has] worked well").

The Tribe also cites interpleader and other *in rem* actions involving personal property. Pet. Br. 34-35; see, *e.g.*, *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008) (foreign sovereign immunity barred interpleader action involving claims to money allegedly stolen from the Republic of the Philippines); *Cory* v. *White*, 457 U.S.

85 (1982) (Eleventh Amendment barred interpleader action against state officials seeking to tax an estate); *Missouri* v. *Fiske*, 290 U.S. 18 (1933) (Eleventh Amendment barred action seeking to enjoin State from imposing inheritance taxes on securities). It also invokes bankruptcy and admiralty cases. Pet. Br. 22-24; see, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) (Bankruptcy Code does not waive the sovereign immunity of the United States from an action seeking monetary recovery); *The Siren*, 74 U.S. (7 Wall.) 152 (1869) (sovereign immunity bars an *in rem* admiralty proceeding against a vessel in which the United States claims an interest).

None of those personal-property cases is relevant here. Because of a territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain," the law has distinguished between cases involving real property and cases involving personal property. *Asociacion de Reclamantes*, 735 F.2d at 1521. As the Washington Supreme Court emphasized, this case involves only "in rem jurisdiction to settle disputes over real property." Pet. App. 7a. All of the cases cited by the court in its discussion of *in rem* jurisdiction involved disputes over real property. *Id.* at 7a-11a. Indeed, the Washington Supreme Court could not have established a rule to govern bankruptcy or admiralty cases because Washington courts lack jurisdiction in such cases. See 28 U.S.C. 1333, 1334(a). Instead, this case is governed by the rule—acknowledged by the United States (Gov't Br. 25)—that a sovereign may not assert immunity to bar an action involving title to land that it holds within the territory of a different sovereign.

D. The unavailability of sovereign immunity in cases involving immovable property applies to Indian tribes as it does to other sovereigns

This Court has observed that Indian tribes "possess[] the common-law immunity from suit traditionally enjoyed by sovereign powers"—not a different, broader immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). The Court has therefore held that the contours of other sovereigns' immunity are "instructive" in defining the scope of tribal sovereign immunity. *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001) (quoting *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998)). And it has declined to "extend[]" tribal sovereign immunity "beyond what common-law sovereign immunity principles would recognize." *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017).

The Tribe and most of its *amici* do not argue that tribal sovereign immunity is broader than the immunity of other sovereigns. Thus, the Tribe concedes (Pet. Br. 29-30) that the reasoning of this Court's decisions on the immunity of States "is equally applicable to tribal sovereign immunity," and that "[t]here is no principled basis to distinguish between the two immunities with respect to sovereign interests in land." Accord *Amici Curiae* Cayuga Nation, et al. Br. 18-19 (rejecting the suggestion "that Indian Tribes should be treated *differently* from other sovereigns" and urging the Court not "to create an Indian-only exception from bedrock immunity principles"); *Amici Curiae* National Congress of American Indians, et al. Br. 6 ("[T]he scope of tribal sovereign immunity is coextensive with the scope of federal and state immunity.").

That principle resolves this case. As explained above, a foreign nation or another State would not enjoy sovereign immunity in these circumstances. If the Tribe is treated like other sovereigns, it does not enjoy immunity either.

The United States, however, takes a contrary position. First, it suggests (Gov't Br. 25) that this Court should not consider foreign and state sovereign immunity at all. It then contends (*ibid.*) that the unavailability of foreign and state sovereign immunity from claims involving immovable property held in a different forum reflects "a special exception or special principles of sovereign immunity" that do not apply to tribes. In its view (Gov't Br. 29), the "contexts" of foreign and state immunity "differ significantly from tribal sovereign immunity." The United States advances several arguments for that view, but none is persuasive.

1. The United States asserts (Gov't Br. 25) that "neither the Washington Supreme Court nor respondents in their brief in opposition urged an exception to tribal sovereign immunity by reference to * * * an immovable-property exception for foreign or sister states." It therefore suggests (*ibid.*)—but does not say explicitly—that the Court might choose not "to consider that argument." The suggestion lacks merit.

The Washington Supreme Court necessarily considered the territorial limitations on sovereignty when it emphasized that state courts have "in rem jurisdiction to settle disputes over real property." Pet. App. 7a. Such jurisdiction rests on an understanding that a State's "jurisdiction to control the ownership and disposition of real property within its territory is a core state prerogative," which is the basis for the limitation on immunity in cases

involving real property. Br. in Opp. 6. The point was made even more explicitly in the principal case taking the Washington Supreme Court's side of the conflict in the lower courts, a case discussed in both the petition (Pet. 7) and the brief in opposition (Br. in Opp. 7). See *Cass Cty. Joint Water Res. Dist.* v. *1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 694 (N.D. 2002) (discussing *City of Chattanooga*).

In any event, the question presented as stated in the petition (Pet. i) is whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." And the brief in opposition noted (Br. in Opp. i) that the question arises in the context of a "quiet title case concerning non-reservation land, where no sovereign interest existed." The question whether other sovereigns could assert immunity in similar circumstances is a "predicate to an intelligent resolution of the question presented" and is therefore fairly included within it. *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006) (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996)); accord *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 n.4 (2008) (question was "fairly included" because the "question presented cannot genuinely be answered without addressing the subsidiary question"); see Sup. Ct. R. 14.1(a).

Indeed, the Tribe's principal argument is that other sovereigns enjoy immunity in these circumstances, and thus tribes should as well. The Lundgrens should be permitted to respond to that argument by showing that other sovereigns do not enjoy immunity in these circumstances. Even the United States begins its argument (Gov't Br. 12) with a discussion that appears under the heading "Sovereign Immunity Bars Suits Against The

Sovereign's Property," necessarily inviting the Court to consider whether or not that broad proposition is true. When "no sovereign interest exist[s]" on the part of the sovereign claiming immunity, it is not. Br. in Opp. i.

2. The United States contends (Gov't Br. 29) that foreign sovereign immunity differs from tribal sovereign immunity because "[f]oreign sovereign immunity is not a judge-made doctrine" but instead has been "determin[ed]" by the Executive Branch and Congress. In fact, "[a]s with tribal immunity, foreign sovereign immunity began as a judicial doctrine." *Kiowa*, 523 U.S. at 759. It was the federal courts, not the other Branches, that "extend[ed] virtually absolute immunity to foreign sovereigns" for more than 150 years. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In *Kiowa*, this Court emphasized that changes to the traditional "judicial doctrine" of foreign sovereign immunity had come from the other Branches, and it concluded that any analogous changes to tribal sovereign immunity should come from those Branches as well. 523 U.S. at 759. By the logic of *Kiowa*, any changes to the traditional immovable-property rule should come from Congress, not this Court.

Noting that the FSIA contains an exception for commercial activity and that "Indian tribes remain immune from suit based on commercial activities," the United States suggests (Gov't Br. 29) that "[t]he same is true with respect to the FSIA's immovable-property exception." But the commercial-activity exception to foreign sovereign immunity is a modern doctrine that was not recognized until 1952, when the United States adopted a "restrictive" theory that extends immunity only to the public acts of a state, and not to its private acts. Letter

from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). As the State Department recognized in announcing the change, sovereign immunity had never extended to claims based on immovable property: Despite the differences between the "classical or absolute theory" and the "newer or restrictive theory," "[t]here is agreement by proponents of *both* theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)." *Alfred Dunhill*, 425 U.S. at 711 (emphasis added). The history of the commercial-activity exception does not support extending to tribes an immunity that no sovereign has ever enjoyed.

3. As to the sovereign immunity of States, the United States argues (Gov't Br. 30) that the immovable-property rule reflects the States' "surrender [of] their immunity as part of the plan of the Convention," a plan to which tribes were not parties. It also observes (Gov't Br. 28) that, in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court held that the Constitution does not require one State to afford another State immunity from suit in its own courts, and it suggests that *Hall* is the basis for the rule that "a sister State * * * would not be entitled to immunity from a quiet-title action." That is incorrect. The Court in *City of Chattanooga* did not rely on *Hall*, which was not decided until 55 years later. Rather, the Court in *City of Chattanooga* held that immunity simply does extend to actions involving "[l]and acquired by one state in another state." 264 U.S. at 480. As the Court explained, "Georgia can claim no sovereign immunity or

privilege" with respect to land it acquired in Tennessee. *Id.* at 479-480. The decision does not reflect a "surrender" of sovereign immunity that would otherwise exist; it reflects the complete absence of immunity to begin with.

4. The United States relies (Gov't Br. 30-31) on what it describes as an "established rule" that this Court may not "fashion exceptions to tribal sovereign immunity" and that such exceptions may be recognized only by Congress. That theory echoes the Tribe's suggestion (Pet. Br. 1) that there are "two, and only two, exceptions" to tribal sovereign immunity: "waiver of the immunity by the tribe and abrogation of the immunity by Congress." Those arguments beg the question by assuming that sovereign immunity would apply to this case in the absence of an "exception." In fact, sovereign immunity has never been applied to protect a sovereign from actions in another sovereign's courts that involve land held in the territory of the forum sovereign.

This Court has repeatedly recognized limits to tribal sovereign immunity even when those limits are not reflected in statutes passed by Congress. For example, even though Congress has never addressed the issue, the Court has held that States may seize tribally owned contraband—such as untaxed cigarettes—moving in off-reservation commerce without violating tribal sovereign immunity. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-162 (1980). Similarly, the Court has recognized that when a tribe sues a non-Indian, the defendant "may assert a counterclaim arising out of the same transaction or oc-

currence that is the subject of the principal suit as a set-off or recoupment." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 891 (1986). Congress has never enacted such an exception to tribal sovereign immunity; it is a purely "judge-made doctrine." Gov't Br. 29.

Most recently, the Court held last Term that tribal sovereign immunity does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment, even though Congress has never legislated on that issue. *Lewis*, 137 S. Ct. at 1290-1292. Rather than ignoring the rules of immunity applicable to other sovereigns and leaving the matter to Congress, the Court evaluated "common-law sovereign immunity principles," applied them to tribes, and concluded that immunity did not exist in that context. *Id.* at 1292. That holding did not create an "exception" to tribal sovereign immunity; instead, the Court recognized that "immunity is simply not in play." *Id.* at 1291. The Court should reach the same conclusion here.

E. This Court should not expand tribal sovereign immunity

This Court has never held that tribal sovereign immunity bars an *in rem* action involving off-reservation land in which a tribe claims a property interest. Applying sovereign immunity to this case would require a significant expansion of the doctrine of tribal sovereign immunity not only beyond the immunity afforded to other sovereigns but also beyond what this Court has previously recognized. Such an expansion is unsupported by precedent; it is unnecessary to protect tribal inter-

ests; and it would impair the interests of States and of private landowners.

1. This Court's precedents do not support expanding immunity

This Court's precedents suggest no reason why Indian tribes, alone among all sovereigns, should be able to immunize real property located outside their sovereign domain from the *in rem* jurisdiction of the sovereign in whose territory the property is located. There is no justification for extending such "super-sovereign" immunity to tribes. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995); cf. *Rice* v. *Rehner*, 463 U.S. 713, 734 (1983) (tribal members are not "super citizens").

a. The limited nature of tribal sovereignty suggests that to the extent tribal sovereign immunity differs from that of other sovereigns, it should be narrower, not broader. Unlike foreign and state sovereignty, tribal sovereignty has been significantly divested. Tribes are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see 25 U.S.C. 71 (prohibiting the future recognition of any Indian tribe as an "independent nation, tribe, or power with whom the United States may contract by treaty"); *United States* v. *Lara*, 541 U.S. 193, 219 (2004) (Thomas, J. concurring in the judgment) ("Although the tribes never fit comfortably within the category of foreign nations, [25 U.S.C. 71] tends to show that the political branches no longer considered the tribes to be anything like foreign nations."). Whereas "[t]he Constitution specifically recognizes the States as sovereign enti-

ties," tribes were not parties to the Convention, and the Constitution does not guarantee their reserved sovereignty. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996). To the contrary, the "incorporation [of tribes] within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); see also *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-426 (1989) (plurality opinion) ("A tribe's inherent sovereignty * * * is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'") (quoting *Wheeler*, 435 U.S. at 326).

The Court has observed that "[t]he sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008). The "semi-independent position" tribes have is "not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973) (quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886)). Even with respect to internal affairs, tribal sovereignty has been divested to a significant degree. For example, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. They cannot exercise regulatory authority over nonmember activity occurring within their territory, except when the nonmembers have entered into a consen-

sual relationship with the tribe or when their activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 566 (1981). "These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks and citations omitted).

Accordingly, "because of the peculiar 'quasi-sovereign' status of the Indian tribes, [their] immunity is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes*, 476 U.S. at 890. Granting tribes an immunity that is far broader than the immunity of foreign nations or States cannot be reconciled with the limited nature of the sovereignty that tribes retain.

b. The concerns this Court has expressed with the application of tribal sovereign immunity also counsel against its expansion. That is especially so in the context of *in rem* actions involving fee land, to which common-law sovereign immunity has never applied. When the Court has held that its precedent required application of sovereign immunity, it has chosen to defer to Congress' decision not to narrow the scope of that doctrine. See *Kiowa*, 523 U.S. at 759 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests."). In this context, where the Court has never held tribal sovereign immunity applicable, it should defer to Congress's decision not to expand its scope.

The Court has also recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine"

of tribal sovereign immunity. *Kiowa*, 523 U.S. at 758. As the Court has explained, the doctrine already "extends beyond what is needed to safeguard tribal self-governance"; it is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"; and it "can harm those who are unaware that they are dealing with a tribe * * * or who have no choice in the matter, as in the case of tort victims." *Id.* at 757-758. The Court expressed similar concerns in *Michigan* v. *Bay Mills Indian Community*, when it reaffirmed *Kiowa* but acknowledged that it had not considered "whether the situation would be different" in the case of a "plaintiff who has not chosen to deal with a tribe [and] has no alternative way to obtain relief for off-reservation commercial conduct." 134 S. Ct. 2024, 2036 n.8 (2014). This case presents no occasion to revisit those decisions because common-law immunity has never applied in these circumstances. But the concerns identified in *Kiowa* and *Bay Mills*, and the Court's deference to Congress, are strong reasons not to expand tribal immunity beyond the scope of the immunity that has been recognized for other sovereigns.

2. Tribal interests do not require expanding immunity

The Tribe observes (Pet. Br. 26) that sovereign immunity protects a sovereign's dignity, financial resources, and self-government. Extending immunity to bar *in rem* actions against tribally owned fee land is unnecessary to advance those interests, which can be better promoted by the federal trust-acquisition process.

a. Actions involving tribally owned fee land do not impair a tribe's sovereign dignity. In the context of

state immunity, the Court has observed that "the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). But any sovereign, when acquiring land outside of its territory, "may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. Because "property ownership is not an inherently sovereign function," an *in rem* action involving that land is not an affront to the sovereign's dignity. *Permanent Mission of India*, 551 U.S. at 199.

Nor does an *in rem* action involving fee land "threaten the financial integrity" of a tribe. *Alden* v. *Maine*, 527 U.S. 706, 750 (1999); see *South Carolina State Ports Auth.*, 535 U.S. at 765 ("[S]overeign immunity serves the important function of shielding state treasuries."). In an *in rem* action, the judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Shaffer*, 433 U.S. at 199.

Actions involving fee lands owned by tribes also do not threaten tribal autonomy or self-governance. In *Kiowa*, this Court observed that "the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States." 523 U.S. at 758; see, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (noting that the application of state law might sometimes "infringe[] on the right of reservation Indians to make their own laws and be ruled by them") (quoting *McClanahan*, 411 U.S. at 172). But the application of

nondiscriminatory rules of state property law to the off-reservation fee holdings of a tribe does not implicate those considerations. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). In *Plains Commerce Bank*, the Court explained that tribal regulation of the sale of non-Indian fee land located within reservation boundaries cannot "be justified by the tribe's interests in protecting internal relations and self-government." 554 U.S. at 336. That is "because non-Indian fee parcels have ceased to *be* tribal land." *Ibid.* And the Court has also concluded that when a tribe reacquires land in fee—even within historic reservation boundaries—that is insufficient to reestablish sovereign control. *City of Sherrill*, 544 U.S. at 203. An *in rem* action against land acquired on the open market cannot threaten tribal autonomy and self-governance because a "tribe's sovereign interests are now confined to managing tribal land," which fee land is not. *Plains Commerce Bank*, 554 U.S. at 334.

Similarly, this Court has upheld *in rem* actions against tribally owned property, emphasizing that States may "of course" enforce their tax laws "by seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi*, 498 U.S. at 514. As the Court has explained, "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Confederated Tribes of the Col-*

ville Indian Reservation, 447 U.S. at 162; accord *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (upholding state *in rem* taxation of "reservation land patented in fee").

b. To the extent that tribal property interests are deemed to require additional protection, Congress and the Executive Branch are able to provide it. Under 25 U.S.C. 5108, the Secretary of the Interior may "acquire * * * any interest in lands * * * for the purpose of providing land for Indians." When the Secretary exercises that authority, he takes title to lands "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Ibid.* The statute provides that land that has been taken into trust "shall be exempt from State and local taxation." *Ibid.* Land held in trust for Indians is "Indian country" for purposes of federal statutes and regulations. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-531 (1998). And by regulation, the Secretary has declared trust lands to be exempt from state and local property laws. 25 C.F.R. 1.4; see also *De Coteau* v. *District Cty. Court*, 420 U.S. 425, 428 (1975).

Significantly, when land is held in trust for a tribe, the sovereign immunity of the United States bars an action challenging the government's title. Although the Quiet Title Act, 28 U.S.C. 2409a, waives sovereign immunity in order to permit the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest," it "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a). The statute thereby "retain[s] the United States' immunity from suit by third parties challenging the United

States' title to land held in trust for Indians." *United States* v. *Mottaz*, 476 U.S. 834, 842 (1986).

While the trust-acquisition process protects tribal interests, it also offers some protection to competing state and private interests. As this Court has observed, the regulations implementing 25 U.S.C. 5108 "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill*, 544 U.S. at 220-221. For example, before taking land into trust, the Secretary must notify "the state and local governments having regulatory jurisdiction over the land to be acquired" and give them an opportunity to comment. 25 C.F.R. 151.11(d). He must also review "title evidence" and identify "any liens, encumbrances, or infirmities" in the tribe's title to the property. 25 C.F.R. 151.13(b). Unlike the "unilateral" shift in sovereign authority sought by the Tribe, that process "takes account of the interests of others with stakes in the area's governance and well-being." *City of Sherrill*, 544 U.S. at 219. The trust-acquisition process thus provides "the proper avenue" for protecting tribal property interests without expanding sovereign immunity. *Id.* at 221; see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (trust-acquisition process would be "render[ed] partially superfluous" if tribes could "oust" state jurisdiction over land simply by buying it).

3. Expanding immunity would impair important state interests

It is "everywhere recognized," this Court has observed, "that the disposition of immovable property, whether by deed, descent, or any other mode, is exclu-

sively subject to the government within whose jurisdiction the property is situated." *United States* v. *Fox*, 94 U.S. 315, 320 (1877). "The power of the state in this respect follows from her sovereignty within her limits." *Ibid.* Expanding tribal sovereign immunity to bar *in rem* actions involving immovable property would undermine that sovereign interest of the State.

The impairment of state interests would not be merely abstract or theoretical. The Washington Legislature has provided that "[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court * * * and may have judgment in such action quieting or removing a cloud from plaintiff's title." Wash. Rev. Code § 7.28.010; see Wash. Const. art. IV, § 6 ("The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property."). The statute reflects the State's practical concern that "[t]itles to real estate * * * not be subjected to continuous clouds." *Phillips*, 131 P. at 463. If tribes were not subject to quiet-title actions with respect to fee lands they purchase on the open market, "[t]he State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property" would be frustrated. *Shaffer*, 433 U.S. at 208 (footnote omitted).

In addition, the same principles of *in rem* jurisdiction that underlie quiet-title actions also form the basis for the State's authority to condemn land for public use and to enforce its property-tax laws. See *Permanent Mission of India*, 551 U.S. at 200-201 (noting that an eminent-domain proceeding "directly implicate[s] rights in

property," and therefore "for an eminent-domain proceeding, [a] foreign sovereign could not claim immunity"); *City of Sherrill*, 544 U.S. at 219-220 & n.13; *County of Yakima*, 502 U.S. at 270. Extending immunity to *in rem* actions involving immovable property would therefore frustrate the exercise of those important state powers, undermining the principle that, notwithstanding tribal immunity, a State should retain the ability "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035; see *Duro* v. *Reina*, 495 U.S. 676, 685 (1990) (A State has "the power to enforce laws against all who come within the sovereign's territory."); *Oneida Indian Nation of N.Y.* v. *Madison County*, 605 F.3d 149, 163-164 (2d Cir. 2010) (Cabranes, J., concurring) (allowing States to tax tribally owned fee lands but not to foreclose for nonpayment of those taxes "defies common sense" and leads to "anomalous" results), vacated, 562 U.S. 42 (2011). With 573 federally recognized tribes located in 35 States, the threat to state interests would be substantial. 83 Fed. Reg. 4235 (Jan. 30, 2018); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40.

The acuteness of the problem is illustrated by the facts of this case, where the Lundgrens' and their family's title to the disputed property had vested in them by virtue of adverse possession and mutual acquiescence years before the Tribe acquired any interest in the property. Pet. App. 15a. If the Tribe's subsequent acquisition could defeat state jurisdiction, then any landowners facing potential quiet-title actions, condemnation proceedings, or tax foreclosures could convey their property to a tribe and avoid a judicial resolution. See, *e.g.*, *Oneida Tribe of Indians of Wis.* v. *Village of Hobart*, 542 F.

Supp. 2d 908, 913-914 (E.D. Wis. 2008) (tribe purchased land scheduled to be condemned for a highway and then attempted to invoke sovereign immunity to avoid condemnation and thus block the highway); *Cass Cty. Joint Water Res. Dist.*, 643 N.W.2d at 688 (tribe purchased land projected to be flooded by proposed dam and then attempted to invoke sovereign immunity to avoid condemnation of the land and thus block the dam); cf. *Allergan, Inc.* v. *Teva Pharm. USA, Inc.*, No. 2:15-CV-1455-WCB, 2017 WL 4619790 (E.D. Tex. Oct. 16, 2017) (patentee assigned patent to an Indian tribe, and tribe attempted to invoke sovereign immunity to defeat inter partes review proceedings).

4. Expanding immunity would leave landowners like the Lundgrens without a meaningful remedy

In *Bay Mills*, this Court noted that it has never "specifically addressed * * * whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." 134 S. Ct. at 2036 n.8. Extending immunity to these circumstances would require the Court to confront that question, for as the Washington Supreme Court observed, dismissing this action on the basis of sovereign immunity "would result in no adequate remedy" for the Lundgrens. Pet. App. 17a. In an effort to resist that conclusion, the Tribe argues that "the Lundgrens had and continue to have a means to seek redress for their claim." Pet. Br. 35 (capitalization altered). In fact, the futility of the Tribe's suggested alternatives only under-

scores that the application of immunity in this case would deprive the Lundgrens of a meaningful remedy.

The Tribe argues (Pet. Br. 36) that the Lundgrens should have "confirm[ed] their title" at some point before the Tribe purchased the property adjoining theirs. That argument is both legally and factually flawed. As a legal matter, it overlooks the rule of Washington law that "[t]itle vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period." *Gorman* v. *City of Woodinville*, 283 P.3d 1082, 1083 (Wash. 2012); see Pet. App. 15a. A "title obtained through adverse possession is as strong as a title acquired by deed," and the adverse possessor "need not sue to perfect his interest." *Gorman*, 283 P.3d at 1084. As a factual matter, the Lundgrens had no reason to "confirm their title" because they were unaware of any competing claims to the property and had no way to anticipate that an Indian tribe might someday buy the adjoining parcel without first conducting a survey, assert a competing claim to a portion of their property, and then seek to foreclose any remedy by invoking sovereign immunity.

In addition, if the Tribe's theory of immunity were correct, the Lundgrens would not have benefitted from successfully pursuing a quiet-title action before the Tribe purchased the adjoining parcel. Under Washington law, a quiet-title action simply "clarifie[s] what already exists." *Gorman*, 283 P.3d at 1085. If the Tribe is immune from this action, which is based on the Lundgrens' title that vested by operation of state law, the Tribe would logically be immune from an action based on a title established by a state-court judgment.

The Tribe next argues (Pet. Br. 36) that "Washington law recognizes a claim for money had and received and a claim for unjust enrichment, either of which the Lundgrens could bring against the seller of the property who, they claim, sold the property without the right to do so." That argument overlooks that money damages are an inadequate remedy for the loss of land. See *Crafts* v. *Pitts*, 162 P.3d 382, 387 (Wash. 2007). In any event, neither claim is viable. As its name implies, a claim for money had and received "is for the recovery of money actually received and wrongfully withheld from plaintiff." *Coast Trading Co.* v. *Parmac, Inc.*, 587 P.2d 1071, 1076 (Wash. Ct. App. 1978). Here, the Lundgrens paid no money to their neighbors who sold the property to the Tribe, and even if they had, there is no indication that those parties have retained the money. See *ibid.* (denying money-had-and-received remedy where recipient no longer held the disputed sum). A similar problem would doom a claim for unjust enrichment, which requires the plaintiff to have conferred a benefit on the defendant. *Young* v. *Young*, 191 P.3d 1258, 1262 (Wash. 2008). Again, the Lundgrens conferred no benefit on the Tribe's predecessors in interest. An unjust-enrichment claim also requires that the receiving party have knowledge of the benefit, whereas any benefit received by the Tribe's predecessors was received unknowingly. See *Cox* v. *O'Brien*, 206 P.3d 682, 689 (Wash. Ct. App. 2009) (purchaser of damaged home could not assert unjust-enrichment claim against seller who was unaware of damage).

Nor do the Lundgrens have any other realistic options. Of course, if the Tribe were to sue them, the Lundgrens would be able to obtain a determination that

title to the disputed property is vested in them. The United States suggests (Gov't Br. 23-24) that the Lundgrens could "log trees on the disputed strip, commence building a structure there, or take other similar actions" to provoke the Tribe to sue. But in order to establish adverse possession, the Lundgrens had to show that they have *already* engaged in an open and notorious occupancy of the disputed property that is hostile to any competing claim. Pet. App. 14a. As this case demonstrates, the Lundgrens cannot force the Tribe to sue if it is unwilling to do so.

Even if the Tribe were to tear down the fence and physically occupy the disputed property—as it has threatened to do, J.A. 20—the Lundgrens would not necessarily be able to establish their title. The Tribe's sovereign immunity would bar an *in personam* trespass action against the Tribe. While the Lundgrens could sue the tribal employees involved in the trespass, see *Lewis*, 137 S. Ct. at 1288, an individual-capacity judgment against one employee would not bind any other employee, see *Taylor* v. *Sturgell*, 553 U.S. 880, 893-895 (2008). Thus, the Lundgrens might be forced to litigate the same issue repeatedly against different tribal employees. In any event, a tortious physical occupation followed by a series of lawsuits would hardly be an orderly or efficient method of determining the parties' rights.

In the absence of such a method, the Tribe's claim of ownership will remain as a cloud on the Lundgrens' title. See *Robinson* v. *Khan*, 948 P.2d 1347, 1349 (Wash. Ct. App. 1998) ("Anything * * * that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is * * * a cloud upon his title which the law

should recognize and remove.") (quoting *Whitney* v. *City of Port Huron*, 50 N.W. 316, 317-318 (Mich. 1891)). That cloud will impair their ability to sell the property, to obtain financing, or otherwise to obtain full enjoyment of their rights. Thus, despite their ownership of the property—recognized by the trial court to be "as clear * * * a case as I've had on the bench," Pet. App. 5a—the Lundgrens will have no effective remedy for the Tribe's impairment of their rights. The Tribe should not be permitted to achieve that unjust result by "wield[ing] sovereign immunity as a sword." *Id.* at 18a.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The question raised by the Lundgrens below, answered by the Washington Supreme Court, and accepted for review by this Court is whether "a court's exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it." Pet. i. Apparently recognizing that the answer to this question is no, the Lundgrens have now abandoned that argument, urging the Court instead to recognize a new "immovable property" exception that would erase tribal sovereign immunity for actions challenging tribal ownership of property held in fee within a state's territory.

This new argument was not raised below or in opposition to the petition for writ of certiorari and is waived. But advancing this argument underscores the fallacy of the one abandoned: the Lundgrens had claimed that sovereign immunity did not apply to their *in rem* quiet title action because the action was against property, not against the sovereign. In fact, the Lundgrens' action directly attacked a sovereign's interest in property—its recorded title. Recognizing that fatal flaw, the new argument concedes that immunity normally bars lawsuits attacking a sovereign's interest in property.

Given that the Lundgrens admit that their "immovable property" exception does not apply to the federal government and has never been applied to tribes, the Court has already answered the argument

the Lundgrens raise: "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2037 (2014).

The Lundgrens' analogy to foreign nations and to states shows the opposite of the proposition they advance. Foreign nations' narrower immunity from suit reflects choices made by the *political* branches—Congress and the Executive. States' narrower immunity reflects mutual waiver and the nature of federalism.

This Court has repeatedly recognized that Indian tribes are "domestic dependent nations" of the federal government subject to the plenary power of Congress, in the federal government's guardianship and "tutelage." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (citations omitted). The Lundgrens cite no case, and the Tribe is not aware of one, where this Court has held that tribes lack immunity from suit in circumstances where the federal government, in a tribe's position and absent waiver, would be immune.

The Court should reject the Lundgrens' invitation to sidestep the political branches and narrow sovereign immunity by judicial action where Congress has not acted and the Executive agrees that tribal sovereign immunity applies.

ARGUMENT

I. The Court Should Decline to Consider the Lundgrens' New Argument for an Immovable Property Exception.

The Lundgrens advance an immovable property exception to tribal sovereign immunity for the first time in their merits brief. The question of the applicability of that exception to tribes has never been raised in this litigation: it was not argued to, or ruled on by, the Washington courts; nor was it identified in the petition for writ of certiorari, opposition, or reply.

The Court should decline to consider this new argument. Under Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *Id.*; *see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]" (alterations in original) (citation omitted)). Under Rule 15.2, any objection to the question presented is "waived unless called to the Court's attention in the brief in opposition." *Id.* Accordingly, arguments not "decided below" and "omitted" from the opposition to the petition for the writ of certiorari "are normally considered waived." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128–29 (2011). The Lundgrens have consistently argued that *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), makes the *in rem* nature of their action dispositive, rendering sovereign immunity irrelevant. The

Washington courts decided the case on that basis, Joint Appendix (JA) 71–72, 105–108, and the Lundgrens' opposition to the petition for writ of certiorari defended the decision below based on *in rem* jurisdiction and *Yakima*, raising no argument that the fact that the property was "immovable" warranted its own exception.

This new argument falls outside the scope of the question presented because the two are not logically congruent: the new argument is both broader and narrower than their discarded argument. It is broader because actions regarding immovable property need not be *in rem* proceedings. *E.g.*, Resp. 12 ("A sovereign may not assert immunity to bar an action in the courts of another sovereign involving interests in land that it owns within the forum sovereign's territory."). It is narrower because it applies only to immovable property, not to all actions that are *in rem*. Nor is addressing the Lundgrens' "immovable property" exception necessary to the "intelligent resolution of the question presented." Resp. 22 (citation omitted). The Court can answer whether *in rem* jurisdiction and *Yakima* render tribal sovereign immunity inapplicable, leaving for another case arguments that a separate "immovable property" exception would allow suit.

The new argument also raises complex new questions about the purpose, history, and limits of tribal, state, and foreign sovereignty, foreign affairs, and the common law dating to the 18th century, questions that the Tribe has been forced, because of its untimely assertion, to answer within the time and

page limit constraints of its reply. Neither the parties nor the Court are well served by the addition of a new issue that has not been fully and fairly litigated.

The Court has previously refused to consider arguments outside the scope of the question presented. *See, e.g., OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397–98 (2015) (refusing to evaluate sovereign immunity on a new basis, holding, "[t]hat argument was never presented to any lower court and is therefore forfeited"); *see also Lewis v. Clarke*, 137 S. Ct. 1285, 1292 n.2 (2017). The Lundgrens waived their new argument by failing to raise it earlier and the Court should not consider it now.

II. The Court Should Continue to Defer to Congress to Define the Extent and Limits of Tribal Sovereign Immunity.

On the merits, the Lundgrens' request for a common-law narrowing of immunity is ill-founded. "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037.

A. The Political Branches, Not the Courts, Have Determined Whether to Except Immovable Property from Foreign Sovereign Immunity.

This Court has previously noted that, "[i]n considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Foreign nations' immunity has narrowed over time not by actions of the Judiciary, but instead because Congress and the Executive narrowed the broad rule of immunity that this Court had previously recognized, and courts deferred to that choice:

> [F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); *see also Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882))).

The development of the immovable property exception reflects this deference. Prior to passage of the Foreign Sovereign Immunities Act (FSIA) in 1976, courts looked to the State Department to determine

whether immunity should be granted. *Verlinden B.V.*, 461 U.S. at 486–88. "Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.* at 486. After the State Department adopted the restrictive theory of foreign sovereign immunity in 1952, "its application proved troublesome." *Id.* at 487. In enacting the FSIA, Congress substituted its political judgment for the State Department's. The FSIA established a default rule of foreign sovereign immunity subject to enumerated exceptions, including an exception for suits "in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. §§ 1604, 1605(a)(4).

The Court has grounded its deference to the political branches on their unique institutional advantages, deference which applies to both foreign and tribal immunity:

> In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area.

Kiowa, 523 U.S. at 759. That is, the Court recognized the default rule of tribal sovereign immunity and deferred to Congress to determine what exceptions, if any, should apply. Just as it was the domain of the political branches to develop and refine exceptions to foreign sovereign immunity (first by

recommendations by the State Department, later by congressional action), so too should Congress take the lead in any consideration of the wisdom and practicalities of an immovable property exception to tribes' sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2039 ("[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty.").

The Lundgrens incorrectly contend that a common-law immovable property exception to foreign sovereign immunity was uniformly recognized since the 18th century. Resp. 13–15. But, as just described, decisions about the application and scope of foreign nation immunity were deemed political questions entrusted to the State Department, not judicial questions answered by the common law. *Verlinden B.V.*, 461 U.S. at 486–87; *Knocklong Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285, 286–87 (Nassau Cty. Ct. 1957) (recognizing sovereign immunity in an action challenging title, after receiving a suggestion of immunity from the State Department). The Tribe has found no pre-FSIA decision by a United States court denying immunity to a foreign sovereign based on a common law immovable property exception. *See* Fredric A. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale J. Int'l L. 1, 33 (1976) (stating that, prior to the FSIA, "[n]o State Department or judicial denial of immunity appears to have been expressly based on" the immovable property exception to foreign sovereign immunity).

Nor does it appear that the Lundgrens have found such a case, citing only *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See* Resp. Brief 13–15. The Court referenced in passing the possibility of an exception to immunity stating, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction." *The Schooner Exchange*, 11 U.S. at 145. But the Court stressed it was not "indicating any opinion on this question," *id.*, nor does the opinion indicate whether the resolution of the question would lie with the political branches or the courts.

Even outside the United States, the immovable property exception appears not to have been uniformly established at common law. *Compare* Resp. 13–15 *with* H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 (1951) (whether there is no immunity with respect to actions relating to immovable property "is not altogether free of doubt—it is significant that there is no English decision directly supporting this exception from the principle of immunity"), *and* Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis* 22 (Gordon J. Laing trans. 1946) (1744) ("In regard to the property of foreign princes there is, however, no unanimity.").

The Lundgrens ask the Court to draw a lesson from the immunity of foreign nations. But the only clear lesson is that the Court established a baseline of immunity from suit, deferring to the political branches to narrow the immunity as necessary.

Applying that lesson here merely reaffirms what the Court held in *Bay Mills*: "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." 134 S. Ct. at 2037.

B. Any Narrowing of Tribal Sovereign Immunity Should Come from Congress.

An "immovable property" exception to tribal sovereign immunity would substantially undermine tribal sovereignty. The Tribe does not ask the Court to weigh these harms against those the Lundgrens claim. Rather, the Tribe identifies some of the harms to illustrate the wisdom of deferring these considerations to Congress.

The Lundgrens sued the Tribe, stating in their complaint that the Tribe "is the record title holder" of the property. JA 12. They sued for the express purpose of "reforming" the "legal descriptions of . . . [the Tribe's] propert[y]" and "terminating" the Tribe's claim to it. JA 15; *see also* Clerk's Papers (CP) 17 (county record identifying Upper Skagit Indian Tribe as "owner" of parcel). The Tribe, like any sovereign whose ownership of property is claimed by another, was forced to choose among invoking sovereign immunity against an action attacking its interest in property (in this case recorded title), waiving immunity and thus bearing the costs of defending against this claim on the merits, forfeiting its right to the property, or paying a settlement. Without sovereign immunity, each option diminishes tribal treasuries and limits the resources tribes can spend to provide services and benefits to its members. And

successful claims asserting ownership of tribal land will erode tribal territory and reduce the cultural, governmental, and economic resources those lands provided. Sovereign immunity is designed to avoid these harms. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("sovereign immunity protects" against the "specific indignity" of the sovereign's "being haled into court without its consent" which "occurs . . . when (for example) the object of the suit . . . is to . . . acquire [the sovereign's] lands"). Pursuant to *Bay Mills*, the question of when these harms should be borne by the tribes is for Congress. 134 S. Ct. at 2030, 2037–38.

Among the important considerations in that legislative examination would be whether to allow litigants to interfere with the trust-acquisition process established by Congress and the Executive to assist tribes in rebuilding their land holdings. *See* 25 U.S.C. § 5108. Actions claiming an interest in Indian lands will slow or halt trust-acquisitions by imposing "liens, encumbrances or infirmities." *See* 25 C.F.R. 151.13(b). Such actions could reverse the progress Indian tribes have made to rebuild tribal territory and self-sufficiency pursuant to the Indian Reorganization Act. *See South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798 (8th Cir. 2005) ("Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities."). Accordingly,

the proposed exception poses a substantial risk of interfering with current law.

Additionally, Congress could weigh the important differences between Indian tribes and other sovereigns. For example, when a state purchases land in another state, or a foreign nation purchases land in another nation, the land normally comprises a small fraction of the sovereign's land holdings. The exercise of local jurisdiction over the land to adjudicate interests and ownership does not meaningfully impact or diminish the sovereignty and holdings of the state and foreign sovereign. But all land that tribes acquire in fee within the United States will exist within the territory of one or more states. Especially for landless tribes (as the Upper Skagit was, *see* Pet. 6–7), property held in fee may comprise a significant portion of land holdings as tribes acquire property as part of the fee-to-trust acquisition process advanced by the Indian Reorganization Act, 25 U.S.C. § 5108.

Whether there is any merit to the Lundgrens' proposed exception is a matter of balancing the tribes' unique sovereign interests within the existing statutory and policy framework. This balancing is a legislative determination best made by Congress. The Quiet Title Act is instructive. When Congress waived the federal government's immunity, it limited that waiver in many ways—for example, by requiring that quiet-title actions be brought in federal court and providing the United States the option to pay compensation in lieu of surrendering ownership. 28 U.S.C. § 2409a(a)–(b); *see* Br. of United States as

Amicus Curiae (U.S. Br.) 31. The Court should "defer to the role Congress may wish to exercise in this important judgment." *Bay Mills*, 134 S. Ct. at 2037 (citation omitted).

III. An Immovable Property Exception to Tribal Sovereign Immunity Would Be Inconsistent with this Court's Settled Precedents and the Unique Nature of Tribes as Domestic Dependent Nations.

The Lundgrens' proposed exception is inconsistent with the legal and factual underpinnings of tribal sovereign immunity. The basic differences among tribes, states, and foreign nations warrant rejection of the proposed exception.

A. This Court's Precedents Foreclose an Immovable Property Exception to Tribal Sovereign Immunity.

The Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills*, 134 S. Ct. at 2030–31 (alteration in original) (quoting *Kiowa*, 523 U.S. at 756). And the Court has never imposed an exception to tribal sovereign immunity for disputes involving immovable property within a state's territory. Instead, the Court has repeatedly held that tribal sovereign immunity extends beyond the borders of reservation land and applies to disputes that arise on land fully subject to a state's

jurisdiction. *See, e.g.*, *id.* at 2034 ("[A] State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation."); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001) (recognizing tribes are not subject to suit for off-reservation commercial conduct absent congressional abrogation or waiver); *Kiowa*, 523 U.S. at 754 (recognizing "our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred" and declining to limit immunity to on-reservation activities); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 167–68, 172–73 (1977) (affirming tribal immunity for claims arising from off-reservation fishing).

The Lundgrens suggest that *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), bars immunity here because the Tribe—having acquired this land on the open market—has no "sovereign interests" at stake. Resp. 11–12, 32. This argument misses the essential holding of *City of Sherrill*, confusing the distinct issues of sovereign authority over land and sovereign immunity from suit. The Court in *City of Sherrill* rejected the Oneida Indian Nation's attempt to assert "sovereign authority to remove the land from local taxation." *Id.* at 215 n.9, 221. Sovereign authority (and the consequent immunity from local taxation) is entirely distinct from sovereign immunity from suit; only the former was at issue in *City of Sherrill*. *Id.* at 214. The Court has never limited tribes' sovereign immunity from suit to sovereign interests or sovereign land—as

is clear from the cases applying immunity to off-reservation, commercial activities.[1]

Bay Mills, *C & L Enterprises*, *Kiowa*, and *Puyallup* established that, when an Indian tribe acts outside reservation or trust land and within the territory of a state, it retains the full protection of sovereign immunity from suit unless Congress limits that immunity. Nothing changes that equation here. When the Tribe purchased land in fee adjacent to its trust and reservation lands, it retained its sovereign immunity from suit. The Lundgrens brought this action, choosing to name the Tribe as a defendant because the Tribe was the "record title holder" of the property, and for the very purpose of "reforming the . . . legal description[] of . . . Defendant's propert[y]." JA 12, 15; *see* CP 17 (property record). The Lundgrens decided that they needed to attack the Tribe's interest and secure recorded title in their name. Absent Congressional abrogation, the Tribe may invoke immunity to bar this action.

The Lundgrens seek to create an exception to the established principle that tribes retain their immunity from suit when acting outside reservation and trust lands. "But this Court does not overturn its precedents lightly. *Stare decisis* . . . 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

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[1] If *City of Sherrill* had any application to these proceedings, it would be in the Court's application of laches to long-dormant claims such as the Lundgrens' claim here.

contributes to the actual and perceived integrity of the judicial process.'" *Bay Mills*, 134 S. Ct. at 2036 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Carving out a new exception here would be particularly problematic because "*stare decisis* concerns are at their acme in cases involving property and contract rights." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). In reliance on this settled law, the Upper Skagit and other tribes have acquired land in fee outside the borders of their reservations and use that land to provide services and benefits for their members. Creating a new exception to tribal sovereign immunity for immovable property would undermine considerable investment and development undertaken by Indian tribes and have sweeping effects on tribal lands, resources, and governance across the country. Such a change cannot be justified absent an exceptionally compelling "special justification." *Bay Mills*, 134 S. Ct. at 2036 (citation omitted). The Lundgrens offer no such justification.

B. The Lundgrens' Analogies to States and Foreign Nations Ignore Basic Differences Bearing on the "Special Brand of Sovereignty the Tribes Retain."

The Lundgrens' reliance on the "immovable property" exception ignores the basic differences among Indian tribes, states, and foreign nations which the Court has repeatedly recognized as creating a "special brand of sovereignty the tribes retain—both its nature and its extent." *Bay Mills*, 134 S. Ct. at 2037.

As to states, this Court explained in *Kiowa* that "the immunity possessed by Indian tribes is not coextensive with that of the States," and, in some ways, the immunity enjoyed by tribes is broader. 523 U.S. at 756. *Contra* Resp. 27 (arguing that the immunity "should be narrower" than "that of other sovereigns"). In particular, the states surrendered their immunity from suits by sister states at the Constitutional Convention. 523 U.S. at 756. Indian tribes did not participate in the Convention and made no such concession. *Id.* Additionally, while "tribal immunity is a matter of federal law and is not subject to diminution by the States," *id.*, "one State's immunity from suit in the courts of another State is . . . a matter of comity," *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

This distinction explains why *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), is of no help to the Lundgrens. In *City of Chattanooga*, the Court held that the State of Georgia could not invoke its sovereign immunity from suit to bar the City's condemnation action regarding Georgia-owned land within Tennessee. *Id.* at 482. The Lundgrens contend that the fact that *City of Chattanooga* predated *Hall* suggests it rested on—but did not identify—an immovable property exception. Resp. 24–25. But *City of Chattanooga* rested on the same notion of "consent" by "a sister state," 264 U.S. at 479–80, as *Hall*. Indeed, the Court in *Hall* identified *City of Chattanooga* as an example of the principle it announced, that a state may make its own policy judgments about recognizing the immunity of other states in its courts. 440 U.S. at 426 n.29. And the

Lundgrens' claim that an (unidentified) "immovable property" exception underlay *City of Chattanooga* is belied by the Court's cabining of its holding in *City of Chattanooga* to "[t]he power of eminent domain," stressing, "we need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its . . . property in that state." 264 U.S. at 480, 482.

If anything, *City of Chattanooga* underscores how states differ from tribes. The case relied not on an "immovable property" exception but on Georgia's "[h]aving acquired land in another state for the purpose of using it in a private capacity"—that is, Georgia's commercial activity. *Id.* at 479; *see also id.* at 481 ("[Georgia's] enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation . . . ."). But this Court has repeatedly reaffirmed that there is no commercial activity exception to tribal sovereign immunity. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2031, 2036–37; *Kiowa*, 523 U.S. at 760; *Puyallup*, 433 U.S. at 167–68.

No less fundamental are the differences between tribes and foreign nations. As already explained, exceptions to foreign sovereign immunity are a matter of deference to the political branches. *See also* U.S. Br. at 29–31. And the political branches have limited that immunity in ways they have not yet seen fit to do with tribes' immunity. For example, pursuant to the "restrictive" theory of foreign sovereign immunity adopted by the State Department

in 1952 and Congress in 1976, foreign sovereigns are generally immune from suit in United States courts, but not immune from suits relating to commercial activity in the United States. *Verlinden B.V.*, 461 U.S. at 486–88; 28 U.S.C. § 1605(a)(2). In contrast, Indian tribes are immune from suits relating to commercial activity, even when that activity takes place off reservation lands. *Bay Mills*, 134 S. Ct. at 2031, 2036–37; *C & L Enters., Inc.*, 532 U.S. at 414; *Kiowa*, 523 U.S. at 760; *Puyallup*, 433 U.S. at 167–68.

The Court has recognized these differences, holding that tribes are "domestic dependent nations," retaining a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2030, 2037; *see also id.* at 2040 (Sotomayor, J., concurring) ("Indian Tribes have never historically been classified as 'foreign' governments in federal courts even when they asked to be."). The Court recognized these differences early in this nation's history. Chief Justice Marshall, writing for the Court in *Cherokee Nation v. Georgia*, stated:

> [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.
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> The Indian territory is admitted to compose a part of the United States. . . .
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> . . . [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United

> States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . . .
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> . . . But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."
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> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.

30 U.S. (5 Pet.) 1, 16–18 (1831).

In light of tribes' distinct status, the Court should not undertake to limit tribal sovereign immunity by analogy to states and foreign nations. This Court has long viewed tribes' immunity as linked to the federal government's, explaining that the same "public policy . . . exempted the dependent as well as the dominant

sovereignties from suit without consent." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512, (1940); *see id.* ("It is as though the immunity which was [tribes'] as sovereigns passed to the United States for their benefit . . . ."). That is consistent with the Court's recognition that Indian tribes are "domestic dependent nations" of the federal government "under the 'tutelage' of the United States." *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *Cherokee Nation*, 30 U.S. at 17 and *Heckman v. United States*, 224 U.S. 413, 444 (1912)); *see also Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) ("[T]ribal sovereign immunity *is* deemed to be coextensive with the sovereign immunity of the United States." (citation omitted)). In this case, were the federal government the purchaser of the land at issue, there is no dispute that it would remain immune from suit absent waiver. Resp. 18.[2] It is for this reason that the Lundgrens' proposed rule—that tribes are subject to suit for property held in fee but not in trust—is not only a flawed legislative judgment,[3] it misconceives the nature and scope of the tribes' immunity from suit.

The Lundgrens cite no case—and the Tribe has found none—in which this Court has deemed tribal immunity from suit to be narrower than the United States' immunity. Of the examples the Lundgrens'

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[2] Congress declined to waive immunity as to suits based on adverse possession. 28 U.S.C. § 2409a(n).

[3] As described in Section II(B), *supra*, before land can be taken into trust, it must be acquired in fee. Litigants who oppose efforts to take tribal land into trust could readily sabotage the trust-acquisition process if land acquired in fee is subject to suit.

cite of limitations on tribal immunity, Resp. 25–26, only *Lewis*, 137 S. Ct. at 1290 (holding that suit could be maintained against individual), and *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986) (commenting that counterclaim alleging setoff would not violate immunity), involved immunity from suit. The limitations identified in each case have analogs in suits against the United States. *See Lewis*, 137 S. Ct. at 1290 ("Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit."); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) ("when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs"). The Lundgrens' other example, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that the state could seize contraband), again evidences the Lundgrens' conflation of sovereign authority with sovereign immunity from suit.

The concessions of federalism answer why the harms to state sovereignty the Lundgrens allege, Resp. 13–14, are legislative, rather than judicial, concerns. By ratifying the Constitution, states relinquished their "primeval interest in resolving all disputes over use or right to use real property," Resp. 14 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)); the federal government's immunity makes that impossible. More, the Supremacy Clause binds states

to federal law, including Congress's power over relations "with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3; *see id.* art. VI, cl. 2, making tribal immunity from suit "a matter of federal law and . . . not subject to diminution by the States." *Kiowa*, 523 U.S. at 752.

States' sovereignty is protected by the rule that Indian tribes and their members are normally "subject to any generally applicable state law" outside reservation boundaries. *Bay Mills*, 134 S. Ct. at 2034. But "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The fact that sovereign immunity may, in some instances, limit states' ability to adjudicate disputes within their territories has never justified judicially limiting tribal immunity from suit.

Nor, finally, does the Lundgrens' suggestion that they lack remedies they deem "adequate," Resp. 37, justify the result they seek. The Lundgrens chose not to pursue any remedy for over 40 years. They downplay the remedies available to them now—such as provoking a suit by the Tribe or individual-capacity suits against Tribe employees—as inefficient or incomplete. Resp. 40. But immunity often "bars . . . the most efficient remedy." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). Similar limited remedies existed for litigants asserting ownership of lands claimed by the United States until Congress narrowed federal immunity through the Quiet Title Act, but the change came through Congress, not the courts. *Block v. North Dakota ex rel. Bd. of Univ. &*

Sch. Lands, 461 U.S. 273, 280–81 (1983). The Lundgrens question whether Washington law would recognize a damages actions against the seller, Resp. 39, but they cite no case that has considered similar facts, and other jurisdictions have expressly allowed such actions.[4] The Court should not entertain their request for a new exception to sovereign immunity based on speculation that the state's remedies might be inadequate, when limitations to tribal immunity from suit remain a matter for Congress.

The Lundgrens chose not to seek to test their claim to title for decades. Then, after the Tribe purchased the property and became its recorded owner, the Lundgrens chose to sue to eradicate the Tribe's interest—that action is barred by sovereign immunity.

IV. Having Sought to Adjudicate the Tribe's Interest in the Property, the Lundgrens' Suit Should Have Been Dismissed for Lack of Jurisdiction.

As "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), Indian tribes retain sovereign immunity from suit in the absence of waiver or

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[4] *See, e.g., In re B & L Oil Co.*, 46 B.R. 731, 736 (Bankr. D. Colo. 1985) ("It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability if in equity and good conscience, he is not entitled to hold it against the true owner." (quoting *Empire Oil Co. v. Lynch*, 126 S.E.2d 478, 479 (Ga. Ct. App. 1962), and citing cases from Minnesota and Kentucky)).

congressional abrogation, *Bay Mills*, 134 S. Ct. at 2028.

When a litigant brings an action targeting an Indian tribe's interest in real property, the tribe need not prove its ownership or disprove the adverse litigant's claim before invoking sovereign immunity from suit; the tribe need only establish it has a non-frivolous interest. *Cf. Republic of the Philippines v. Pimentel*, 553 U.S. 851, 864, 867 (2008) (holding that sovereign with non-frivolous claim may bar adjudication of interpleader action). Once the tribe does so, the action must be dismissed for lack of jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

The Lundgrens brought an action to adjudicate the Tribe's interest in certain property. Their complaint named the Tribe as the defendant, conceded that the Tribe is record owner of the property, and asked the Court to order that the Tribe's name be removed from the governmental property records, confirming the Tribe's interest is non-frivolous. JA 12, 15; CP 17. The Tribe had the right to invoke its sovereign immunity from suit and prevent the court from exercising jurisdiction. *See Lewis*, 137 S. Ct. at 1291 (holding that tribal sovereign immunity was not implicated because lawsuit "will not require action by the sovereign or disturb the sovereign's property" (citation omitted)). The Washington courts erred by failing to give effect to the Tribe's immunity from suit and instead adjudicating the Tribe's interests on the merits.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

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In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE, PETITIONER

v.

SHARLINE LUNDGREN AND RAY LUNDGREN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars an action against the Tribe to quiet title to property purchased by the Tribe outside of its reservation, where the Tribe has not waived its immunity and Congress has not unequivocally abrogated the Tribe's immunity.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Washington Supreme Court held that tribal sovereign immunity did not bar respondents' action to quiet title to land owned by an Indian tribe, based on the rationale that the state court could exercise *in rem* jurisdiction over the land itself without obtaining personal jurisdiction over the sovereign landowner. The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). A tribe's sovereign immunity from suit is one important protector of tribal autonomy. Additionally, the United States, as a sovereign landowner that has waived its immunity from suit only in specific circumstances and only in federal court, see Quiet Title Act, 28 U.S.C. 2409a, has an interest in ensuring that state courts do not quiet title to land owned

by the United States based on the rationale adopted by the Washington Supreme Court.

STATEMENT

1. a. Petitioner, a federally recognized Indian tribe, has a reservation that includes land along the east side of Interstate 5 north of the town of Burlington, Washington. See 46 Fed. Reg. 46,681 (Sept. 21, 1981) (establishing Upper Skagit Indian reservation). In 2013, petitioner purchased an approximately 40-acre parcel of forested land just west of Interstate 5, across from petitioner's reservation. See J.A. 33. Petitioner purchased the tract of land from the heirs of Annabell Brown and received a statutory warranty deed. Pet. App. 3a; Clerk's Papers (C.P.) 17, 85-88.

In anticipation of asking the Secretary of the Interior to take the parcel of land into trust for petitioner pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, petitioner had the parcel surveyed. Pet. App. 3a. The surveyors alerted petitioner to the presence of an old barbed-wire fence running generally east-west across the parcel through the forest near its southern boundary. *Id.* at 2a-3a; J.A. 39-41. Since 1981, respondents, Sharline and Ray Lundgren, have owned the approximately 10-acre parcel of land to the south of the parcel purchased by the Tribe. Pet. App. 2a; C.P. 14, 96.

The fence, which is 1306 feet long with a 12-foot gate in the middle, is about 19 feet north of the property line between the two parcels on the east end and about 42 feet north of the property line on the west end, creating an approximately one-acre strip between the fence and the southern boundary of the property line. J.A. 38 (map with dimensions); J.A. 40. After the fence was dis-

covered, tribal officials communicated with respondents, who initially expressed interest in purchasing the strip from petitioner or trading another nearby parcel for the strip. J.A. 39-41.

b. When petitioner decided to retain the strip, respondents filed a quiet-title action in the Superior Court for Skagit County, naming petitioner as the defendant and personally serving petitioner pursuant to Washington Revised Code Annotated § 7.28.010 (West 2017). Pet. App. 4a; J.A. 11-16; C.P. 225-227. Respondents contended that they had acquired title to the strip by adverse possession before petitioner bought the land or, alternatively, that there was mutual acquiescence that the fence was the boundary. Pet. App. 4a. Petitioner entered a special appearance to assert its sovereign immunity from suit. C.P. 256.

Respondents moved for summary judgment. C.P. 191-216. They submitted declarations stating, *inter alia*, that the fence was in its present location in 1947, when Sharline Lundgren's grandmother purchased the parcel now owned by respondents. Pet. App. 3a; C.P. 60; see C.P. 60-63, 110-113; J.A. 17-27.

Petitioner moved to dismiss the action for lack of subject matter jurisdiction based on its sovereign immunity. Pet. App. 4a; C.P. 232-235. Alternatively, petitioner contended that the case must be dismissed because, under Washington Superior Court Civil Rule 19, petitioner was a necessary and indispensable party that could not be joined because of its sovereign immunity. Pet. App. 4a-5a & n.2; C.P. 235-240.

2. a. The superior court denied petitioner's motion to dismiss. Pet. App. 5a-6a, 39a-40a. The court concluded that petitioner's argument was foreclosed by *Smale* v. *Noretep*, 208 P.3d 1180 (Wash. Ct. App. 2009).

C.P. 134; J.A. 75-76. In *Smale*, the Court of Appeals of Washington had held that the superior court could continue to exercise jurisdiction over an action seeking to quiet title based on an adverse possession claim, even though an Indian tribe had acquired the disputed property from the original non-Indian defendants after the action was commenced. 208 P.3d at 1180. The court of appeals had reasoned that "[b]ecause courts exercise in rem jurisdiction over the property subject to quiet title actions, * * * transferring the disputed property to a tribal sovereign does not bar the continued exercise of subject matter jurisdiction over the property." *Ibid.*

b. After petitioner's motion to dismiss was denied, the superior court granted summary judgment in favor of respondents. Pet. App. 5a; C.P. 158-160, 224. The court concluded that all of the elements of adverse possession under state law had been established. J.A. 95-97. The court further concluded that "[t]he doctrine of recognition and acquiescence also applies" based on "manifestations of mutual recognition and acceptance" of the fence as the boundary line. J.A. 97.

3. The Washington Supreme Court accepted discretionary direct review of both superior court orders, Pet. App. 5a-6a, and it affirmed in a 5-4 decision, *id.* at 1a-38a.

a. i. The Washington Supreme Court explained that "[s]uperior courts in Washington have jurisdiction to exercise in rem jurisdiction to settle disputes over real property." Pet. App. 7a. The court characterized quiet-title actions as proceedings "in rem" in which "the court has jurisdiction over the property itself." *Id.* at 7a-8a. The court stated that "[p]ersonal jurisdiction over the landowner is not required" in such proceedings. *Id.* at 8a.

The Washington Supreme Court reasoned that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." Pet. App. 8a. According to the court, that principle was recognized by this Court in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). The court noted that, in *County of Yakima*, this Court reached the conclusion that the Indian General Allotment Act (General Allotment Act), ch. 119, 24 Stat. 388, allowed the county to impose ad valorem taxes on reservation fee land "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the [Tribe]." Pet. App. 8a. The court also relied upon state-court precedent "uph[olding] a superior court's assertion of in rem jurisdiction over tribally owned fee-patented land." *Id.* at 9a; see *id.* at 9a-11a (citing *Anderson & Middleton Lumber Co.* v. *Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996), and *Smale*, *supra*). The court concluded that, under those precedents, Washington state courts "have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." *Id.* at 11a.

ii. The Washington Supreme Court further rejected petitioner's argument that, under Superior Court Civil Rule 19, petitioner is a necessary and indispensable party to respondents' quiet-title suit. Pet. App. 11a-16a.

Under Civil Rule 19(a), a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest" must be joined if feasible. Pet. App. 27a-28a. The Washington

Supreme Court concluded that adjudicating respondents' quiet-title action would have no impact on petitioner's interests—and thus petitioner was not a necessary party—because respondents had proven their claim of adverse possession. *Id.* at 13a-16a. The court reasoned that because respondents had established adverse possession of the disputed strip, see *id.* at 14a-16a, they "are not seeking to divest a sovereign of ownership or control," but rather "are attempting to retain what they already own," *id.* at 13a.

The Washington Supreme Court further concluded that, even though its conclusion that petitioner is not a necessary party eliminated any need to consider whether the action should nevertheless proceed in petitioner's absence, see Civil Rule 19(b), it would be inequitable to dismiss respondents' suit because "dismissal would result in no adequate remedy for the plaintiff." Pet. App. 17a. In the court's view, "allowing [petitioner] to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder." *Id.* at 18a.

b. Justice Stephens, joined by three other justices, dissented, concluding that respondents' action should be dismissed. Pet. App. 19a-38a.

Justice Stephens agreed with the majority that "the existence of in rem jurisdiction gives a court authority to quiet title to real property without obtaining personal jurisdiction over affected parties." Pet. App. 20a; see *id.* at 20a-22a. She explained, however, that "[t]he court's authority to exercise in rem jurisdiction does not obviate the need to determine which parties must be joined to fully and justly adjudicate the action." *Id.* at 22a-23a. In her view, Civil Rule 19 "counsels against

exercising this authority in the face of a valid assertion of sovereign immunity." *Id.* at 20a.

Justice Stephens concluded that petitioner was a necessary party given its record-title claim to the disputed strip. Pet. App. 28a-29a. She explained that the majority had erred by first deciding the merits of respondents' adverse possession claim and holding on that basis that petitioner was not a necessary party. *Id.* at 26a-27a. She stated that it "make[s] no sense that a court evaluating the interests of a party who cannot be joined to an action could summarily decide the party will lose, and therefore has no interests to protect." *Id.* at 27a. In her view, Civil Rule 19 "*precludes* a court from considering the merits when one of the parties validly asserts sovereign immunity." *Id.* at 26a.

Justice Stephens further concluded that, under the factors set forth in Civil Rule 19(b), respondents' quiet-title action should not proceed without petitioner. Pet. App. 29a-37a. In her view, a judgment for respondents in petitioner's absence "would not bind [petitioner]," *id.* at 32a, and proceeding without petitioner could thus "prevent [respondents] from providing marketable title should they someday wish to sell their property." *Id.* at 33a; see *id.* at 34a-35a. Justice Stephens acknowledged that dismissal would leave respondents without a judicial forum in which to pursue relief. *Id.* at 35a. She explained, however, that sovereign immunity often produces that result. *Id.* at 35a-36a.

SUMMARY OF ARGUMENT

I. State courts cannot circumvent tribal sovereign immunity by exercising *in rem* jurisdiction over tribal property.

A. This Court's cases establish the principle that sovereign immunity from suit bars suits against the sovereign's property. In *United States* v. *Alabama*, 313 U.S. 274 (1941), the Court held that state tax liens could not be enforced through a judicial sale of property subsequently purchased by the United States because "[a] proceeding against property in which the United States has an interest is a suit against the United States." *Id.* at 282. The Court has also held that the States are entitled to Eleventh Amendment immunity in federal court from suits that would effectively quiet title to state-owned land. *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267-268 (1997). Tribal sovereign immunity is "a matter of federal law," *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct 2024, 2031 (2014) (citation omitted), and the principle that a suit against the sovereign's property is a suit against the sovereign itself therefore applies to Indian tribes. A state-law classification of an action as *in rem* cannot determine federal rights.

B. This Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), does not provide a basis for an *in rem* exception to tribal sovereign immunity. In *County of Yakima*, the Court characterized an ad valorem tax on fee-patented land within a reservation as "*in rem* rather than *in personam*" to distinguish the real property tax from cigarette sales taxes and personal property taxes that had been invalidated in an earlier case. *Id.* at 265. That characterization for the purpose of determining the validity of a particular tax does not support the conclusion that state courts can adjudicate rights in tribal property notwithstanding tribal immunity from suit.

C. The Washington Supreme Court's joinder analysis did not overcome its erroneous adoption of an *in rem* exception to tribal sovereign immunity. Application of a rule like Civil Rule 19 makes little sense where the sole entity claiming an interest in the property is the only named defendant. In any event, petitioner was a necessary party under that rule because it claimed an interest in the disputed strip based on its record title. In concluding that respondents' suit should nevertheless proceed, the court overlooked many alternative ways in which the parties' dispute could be resolved.

II. If respondents' suit had been brought against a foreign state or a sister state that had purchased real property in Washington, sovereign immunity would not have barred the suit. The immunity of foreign states is governed by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), which provides a statutory exception to immunity in any case "in which rights * * * in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). And another State would not be entitled to immunity from a quiet-title action unless Washington granted that other State immunity. *Nevada* v. *Hall*, 440 U.S. 410, 416 (1979). But neither of those exceptions provide a basis for a similar exception here. Congress has not adopted an immovable-property exception to tribal sovereign immunity like the one that applies to foreign states in the FSIA. And the States surrendered their immunity with respect to one another by mutual concession at the Constitutional Convention. Tribal sovereignty, by contrast, is a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. This Court has properly de-

clined to fashion exceptions to tribal sovereign immunity, and there is no occasion to depart from that established rule here.

ARGUMENT

I. STATE COURTS CANNOT CIRCUMVENT TRIBAL SOVEREIGN IMMUNITY BY EXERCISING *IN REM* JURISDICTION OVER TRIBAL PROPERTY

Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citations and internal quotation marks omitted). One of the "core" aspects of sovereignty that Indian tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Ibid.* (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). That immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Ibid.* (quoting *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)); see *ibid.* ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent.") (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (Benjamin Wright ed. 1961)). This Court accordingly has long recognized that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); see *Bay Mills*, 134 S. Ct. at 2030-2031; *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S.

165, 172-173 (1977).[1] Tribal sovereign immunity applies to suits based on activities (including commercial activities) both on and off the tribe's reservation. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758. And any abrogation of that immunity by Congress must be clear and unequivocal. *Bay Mills*, 134 S. Ct. at 2031-2032.

The Washington Supreme Court recognized, and respondents do not dispute, that petitioner is entitled to immunity from suit based on its status as a federally recognized Indian tribe. Pet. App. 7a. The court held, however, that petitioner's immunity from suit did not bar respondents' action to quiet title to land in which petitioner claimed an interest because the court could exercise *in rem* jurisdiction over the land itself, and therefore "[p]ersonal jurisdiction over the landowner is not required." *Id.* at 7a-8a. That holding is incorrect.

Tribal sovereign immunity is a matter of federal law, *Bay Mills*, 134 S. Ct. at 2031, and this Court's federal sovereign immunity precedents have made clear that a suit against the sovereign's property is a suit against the sovereign itself. The Washington Supreme Court erred in relying on this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), for its conclusion that there is an *in rem* exception to tribal sovereign immunity from suit (Pet. App. 8a-9a), and the court's consideration of tribal sovereign immunity through a joinder analysis under Superior Court Civil Rule 19 failed to overcome that error.

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[1] See also *Adams* v. *Murphy*, 165 F. 304, 308 (8th Cir. 1908); *Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895).

A. Sovereign Immunity Bars Suits Against The Sovereign's Property

1. This Court's cases establish the principle that sovereign immunity from suit bars suits against the sovereign's property. In *United States* v. *Alabama*, 313 U.S. 274 (1941), the Court held that state tax liens that had been imposed on property subsequently purchased by the United States could not be enforced through a judicial sale of the property. *Id.* at 282. The Court explained that "[a] proceeding against property in which the United States has an interest is a suit against the United States," and that the suit was therefore barred by sovereign immunity. *Ibid.* (citing *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) ("[T]here is no distinction between suits against the government directly, and suits against its property.")).

Similarly, in *Minnesota* v. *United States*, 305 U.S. 382 (1939), the Court held that Minnesota's state-court condemnation action to obtain a right of way for a highway across land held in trust by the United States for individual Indians could not proceed in state court. *Id.* at 386-387. The Court explained that "[a] proceeding against property in which the United States has an interest is a suit against the United States," and the suit therefore could not go forward without the United States—the "own[er] [of] the fee of the[] parcels." *Id.* at 386. Because Congress had not waived the United States' immunity from condemnation actions in state courts, the suit had to be dismissed. *Id.* at 388.

And in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the Court held that the State of Idaho had Eleventh Amendment immunity from a suit brought in federal court by an Indian tribe seeking injunctive relief that would effectively quiet title to the submerged lands

and bed of Lake Coeur d'Alene. *Id.* at 264 (opinion of Kennedy, J.); *id.* at 281 (describing Tribe's suit as "the functional equivalent of a quiet title action"). The Court explained that the Eleventh Amendment, which "enacts a sovereign immunity from suit" for the States in federal court, barred the Tribe's suit. *Id.* at 267-268.

2. The Washington Supreme Court's holding is inconsistent with that fundamental principle of sovereign immunity. If the Washington Supreme Court were correct that a state court's assertion of *in rem* jurisdiction over a sovereign's property rendered the sovereign's immunity from suit irrelevant, Pet. App. 8a, then Washington courts would in theory have the authority to quiet title even to property owned by the United States. It is firmly established, however, that sovereign immunity bars quiet-title actions against the United States, and that such actions may proceed only pursuant to the waiver of sovereign immunity contained in the Quiet Title Act, 28 U.S.C. 2409a. See *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983).

The Washington Supreme Court's *in rem* jurisdiction principle would also imply that Washington state courts could quiet title to land owned by the State without a waiver of immunity. But the Washington Supreme Court had previously held that an action to determine title to real property may proceed against the State in its own courts only pursuant to the State's statutory waiver of immunity. See *State* v. *Superior Court*, 94 P.2d 505, 506-507 (1939) (stating that "an action * * * to determine the title to real property" "may not be maintained against the [S]tate without its consent").[2]

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[2] Washington has waived its sovereign immunity in its own courts as to "[a]ny person or corporation having any claim against the

3. The Washington Supreme Court did not offer any justification for why a principle of *in rem* jurisdiction could be fashioned to apply only to Indian tribes, and no justification exists.

a. The contours of tribal sovereign immunity are "a matter of federal law," *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756), and the principle that a suit against the sovereign's property is a suit against the sovereign itself therefore applies to Indian tribes, just as it applies to other sovereigns. See, *e.g.*, *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1291-1292 (2017) (following federal precedent on the distinction between official-capacity and individual-capacity suits in the context of tribal sovereign immunity); *Cayuga Indian Nation of N.Y.* v. *Seneca County*, 761 F.3d 218, 220-221 (2d Cir. 2014) (per curiam) (holding that tribal sovereign immunity barred foreclosure proceedings against real property owned by an Indian tribe to recover unpaid property taxes and "declin[ing] to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged [the court] to adopt") (citing *The Siren*, 74 U.S. (7 Wall.) at 154); *First Bank & Trust* v. *Maynohonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) (rejecting argument that tribal sovereign immunity did not bar the exercise of *in rem* jurisdiction over money in a tribal bank account).

This Court has previously cautioned that state-law "classification of an action as *in rem* or *in personam*" cannot determine federal rights. *Shaffer* v. *Heitner*, 433 U.S. 186, 206 (1977). *Shaffer* involved a Delaware statute that established state-court jurisdiction over a lawsuit "by sequestering any property of the defendant

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[S]tate of Washington." Wash. Rev. Code Ann. § 4.92.010 (West 2017).

that happens to be located in Delaware." *Id.* at 189. The Delaware courts had rejected the defendants' argument that the state court lacked personal jurisdiction over them "by noting that this suit was brought as a *quasi in rem* proceeding * * * based on attachment or seizure of property present in the jurisdiction." *Id.* at 196.

This Court concluded, however, that the same due-process standard for personal jurisdiction articulated in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), must also be satisfied to obtain *in rem* jurisdiction over the defendants' property. *Shaffer*, 433 U.S. at 207. The Court reasoned that a state-court's "jurisdiction over a thing" (*i.e.*, *in rem* jurisdiction) was a "customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Ibid.* (quoting Restatement (Second) of Conflict of Laws § 56, intro. note (1971)). The Court relied on *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which it had explained that Fourteenth Amendment due-process rights "cannot depend on the classification of an action as *in rem* or *in personam*," because that is "a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Shaffer*, 433 U.S. at 206 (quoting *Mullane*, 339 U.S. at 312).

b. This case well illustrates why a state-law *in rem* label should not determine an Indian tribe's immunity from suit. For its explanation that "[q]uiet title actions are proceedings in rem" in which personal jurisdiction over the defendant is unnecessary, Pet. App. 7a, the Washington Supreme Court cited *Phillips* v. *Thompson*, 131 P. 461 (1913). In *Phillips*, the Washington Su-

preme Court explained that States, including Washington, had addressed the problem of quiet-title suits that involve "unknown heirs, and unknown parties, who may be [outside] the jurisdiction of the state in which the real estate is located," by enacting statutes that allow for service by publication rather than personal summons in some circumstances. *Id.* at 463.

The relevant Washington statute requires a plaintiff to name as defendant the "tenant in possession" or other "person claiming the title or some interest therein," and to serve a summons on the defendant unless the defendant is absent from Washington or cannot be found within Washington, in which case service may be made by publication. Wash. Rev. Code Ann. § 7.28.010 (West 2017). The Washington Supreme Court's statement that "[p]ersonal jurisdiction over the landowner is not required" in proceedings *in rem* (Pet. App. 8a) thus appears to be overbroad even as a matter of state law, as personal service on in-state defendants is required to the extent possible.

Furthermore, this is not a case in which petitioner was absent from Washington or could not be found. In fact, respondents named petitioner as the sole defendant in their quiet-title action and personally served petitioner with a summons at its offices within the State. Pet. App. 4a; J.A. 11-17; C.P. 225-227. The *in rem* label has no apparent significance in cases in which the process for obtaining personal jurisdiction has been accomplished. See, *e.g.*, 4A Charles Alan Wright et al., *Federal Practice and Procedure* § 1070, at 442 (2015) ("in rem or quasi-in-rem jurisdiction represents an alternative to in personam jurisdiction" "when one or more of the defendants or persons with potential claims to the

property are nonresidents or jurisdiction over their person cannot be secured in the forum state").

In any event, this Court has characterized tribal sovereign immunity as a matter of subject matter jurisdiction, not personal jurisdiction, as the rationale for sovereign immunity goes beyond concerns about fair notice and the burden of defending litigation in an out-of-state forum. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 153 n.6 (2009); *United States* v. *Alabama*, 313 U.S. at 282; *Minnesota* v. *United States*, 305 U.S. at 389; see also *Bodi* v. *Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1014-1015 (9th Cir. 2016); *Alabama* v. *PCI Gaming Auth.*, 801 F.3d 1278, 1286 (11th Cir. 2015); *Breakthrough Mgmt. Grp., Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1177 (10th Cir. 2010), cert. dismissed, 564 U.S. 1061 (2011); *Miner Elec., Inc.* v. *Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). The Washington Supreme Court's distinction between *in rem* and *in personam* jurisdiction thus does not withstand scrutiny.

B. *County Of Yakima* Does Not Provide A Basis For An *In Rem* Exception To Tribal Sovereign Immunity

The Washington Supreme Court relied on this Court's decision in *County of Yakima* to support its conclusion that state courts could exercise *in rem* jurisdiction over tribal property. The Washington Supreme Court reasoned that, in *County of Yakima*, this Court reached the conclusion that the General Allotment Act allowed the county to impose ad valorem taxes on fee-patented land "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the [Tribe]." Pet. App. 8a. *County of Yakima* does not support the Washington Supreme Court's decision.

In *County of Yakima*, this Court considered whether the county could impose an ad valorem tax on fee-patented land within the Yakima Indian Reservation and whether it could impose an excise tax on the sale of such lands. 502 U.S. at 253. The parcels of land at issue, although within the Tribe's reservation, were owned in fee by individual Indians, by non-Indians, or by the Tribe. *Id.* at 256. That situation resulted from land patents issued pursuant to Section 6 of the General Allotment Act, which provided for the allotment of reservation lands to individual Indians, to be held in trust by the United States (and therefore restricted from alienation or encumbrance) for 25 years. At the conclusion of that 25-year period (unless extended by subsequent statutes), a fee patent would be issued to the individual Indian allottee, freeing the land of its restrictions. *Id.* at 254. The "allotment era" ended with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, which "halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." *County of Yakima*, 502 U.S. at 255-256. The Indian Reorganization Act did not, however, attempt "to undo the dramatic effects of the allotment years on the ownership of former Indian lands," because it did not "encumber [the] fee-patented lands [or] impair [] the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands." *Id.* at 255.

In determining that the county could impose the ad valorem tax on fee-patented land within the reservation, the Court characterized the tax as "*in rem* rather than *in personam*," *County of Yakima*, 502 U.S. at 265, in order to distinguish it from the cigarette sales taxes and personal property taxes imposed on Indian residents of

a reservation that the Court had invalidated in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the State of Montana had asserted that, under Section 6 of the General Allotment Act, it had reservation-wide taxing jurisdiction because "a[] scheme of divided jurisdiction would be inequitable." *County of Yakima*, 502 U.S. at 261. The Court in *Moe* rejected that argument and further held that, in light of Congress's 1934 repudiation of the policies behind the General Allotment Act, "the Act could no longer be read to provide Montana plenary jurisdiction even over those Indians residing on reservation fee lands." *Ibid.* (quoting *Moe*, 425 U.S. at 479).

The Court explained in *County of Yakima* that "*Moe* was premised * * * on the implausibility, in light of Congress' postallotment era legislation, of Montana's construction of [Section] 6 that would extend the State's *in personam* jurisdiction beyond the section's literal coverage." 502 U.S. at 262. But, the Court continued, Congress had specifically provided that the issuance of a fee patent to an individual allottee "would free the *land* of 'all restrictions as to sale, incumbrance, or taxation,'" thus explicitly subjecting fee-patented land to real property taxes. *Id.* at 264 (citing 25 U.S.C. 349). The Court therefore concluded that the ad valorem tax was not "*Moe*-condemned" because the State's authority to impose the tax was "*in rem* rather than *in personam*." *Id.* at 264-265.[3]

The Court's characterization of the county's jurisdiction to tax fee-patented land within the reservation as

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[3] In contrast, the Court held that the county could not impose an excise tax on the sale of fee-patented reservation land because Congress had authorized state jurisdiction to tax only the land, not its sale. *County of Yakima*, 502 U.S. at 268.

"in rem" for the specific purpose of determining its validity under Section 6 of the General Allotment Act does not support the conclusion that state courts can exercise *in rem* jurisdiction over reservation lands generally or that they may do so to adjudicate rights in tribal property notwithstanding a tribe's immunity from suit. See *Cayuga Indian Nation*, 761 F.3d at 221 (rejecting county's reliance on *County of Yakima* and distinguishing between "the common-law tribal immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes"). The Court had no occasion to address tribal sovereign immunity from suit in *County of Yakima* because the Tribe itself had commenced that suit in federal district court to obtain declaratory and injunctive relief regarding its tax liability. 502 U.S. at 256. And although the Court resolved those questions about the Tribe's tax liability, finding the necessary express authorization of state taxation in Section 6 of the General Allotment Act, it had no occasion to consider whether the Tribe would be entitled to sovereign immunity in a subsequent foreclosure proceeding to collect taxes owed. Accordingly, nothing in *County of Yakima* suggests that Congress had given the clear and unequivocal authorization that would be necessary to abrogate the Tribe's sovereign immunity to such a proceeding, and indeed both the majority and dissent characterized the Court's holding as concerning taxability, with no mention of sovereign immunity from suit. *Id.* at 270 ("We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act."); *ibid.* (Blackmun, J., concurring in part and dissenting in part) ("I dissent from [the majority's] conclusion that the county may

impose ad valorem taxes on Indian-owned fee-patented lands."). *County of Yakima* therefore does not support the Washington Supreme Court's conclusion that tribal sovereign immunity does not bar respondents' quiet-title action or any other action that might be characterized as *in rem*.

C. The Washington Supreme Court's Joinder Analysis Under Civil Rule 19 Failed To Overcome Its Erroneous Adoption Of An *In Rem* Exception To Tribal Sovereign Immunity

1. Despite the Washington Supreme Court's mistaken reliance on a distinction between *in rem* and *in personam* actions, the court did not completely reject all consideration of tribal sovereign immunity from suit. Instead, it considered petitioner's immunity by analyzing whether petitioner was a necessary party to respondents' quiet-title action under Superior Court Civil Rule 19. Pet. App. 11a-16a. Although petitioner was named as the only defendant in the suit and was personally served with a summons, *id.* at 4a; J.A. 11-17; C.P. 225-227, the court apparently conceptualized the parcel of land as the defendant and petitioner as a potential additional defendant that claimed an interest in the property.

Application of a rule like Civil Rule 19 makes little sense where, as here, the sole entity claiming an interest in the property is the only named defendant. But even if a Civil Rule 19 approach made sense, the majority's holding that petitioner was not a necessary party under that rule failed to respect tribal sovereign immunity. Justice Stephens correctly explained that petitioner was a necessary party because it claimed an interest in the disputed strip based on its record title. Pet. App. 28a-29a; cf. *United States* v. *Alabama*, 313

U.S. at 282 ("The United States was an indispensable party to proceedings for the sale of the lands [in which the United States has an interest], and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees * * * were void.").

The majority, in contrast, reached ahead and decided the merits of respondents' adverse-possession claim and on that basis determined that petitioner had no interest at stake in the dispute. Pet. App. 13a-16a. The majority's approach was incompatible with the Tribe's federally protected sovereign immunity. Cf. *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 864 (2008) (explaining that the court of appeals' "consideration of the merits" to determine whether a foreign sovereign had an interest in disputed property sufficient to make it a required party under Federal Rule of Civil Procedure 19 "was itself an infringement on foreign sovereign immunity"). Indeed, that approach, if applied to sovereign immunity generally, would improperly allow claims of adverse possession to be adjudicated against land owned by the United States or a State—without regard to a waiver of sovereign immunity—on the theory that plaintiffs who have proved their claim of adverse possession are "not seeking to divest a sovereign of ownership or control" but are merely "attempting to retain what they already own." Pet. App. 13a.[4]

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[4] Respondents' argument (Br. in Opp. 8-9) that sovereign immunity is not implicated when a quiet-title plaintiff claims title by adverse possession is without merit. Under Washington law, an adverse possessor obtains "original title" when the legal requirements of adverse possession are met for ten years. *El Cerrito, Inc.* v. *Ryndak*, 376 P.2d 528, 532 (Wash. 1962). But the adverse possessor does not simply file a notice of "original title" in the property records like

The Washington Supreme Court also overlooked important federal interests protected by tribal sovereign immunity in concluding that, even if petitioner was a necessary party, respondents' suit should nevertheless proceed "in equity and good conscience." C.R. 19(b); See Pet. App. 16a-18a.[5] The court was primarily concerned with what it perceived to be respondents' lack of any forum in which to quiet title to the disputed strip if petitioner's immunity prevented the case from going forward. Pet. App. 18a. This Court has explained, however, that if a sovereign asserts immunity in a quiet-title action, "[n]othing prevents the claimant from continuing to assert his title, in hope of inducing the [sovereign] to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Block*, 461 U.S. at 291-292. Respondents could, for example, log trees on the disputed strip, commence building a structure

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filing a lien. The adverse possessor must file suit against the title holder if it wishes to quiet title. In that suit, the record title holder may challenge the claim of adverse possession, and the court decides whether the legal requirements of adverse possession have been satisfied. See, *e.g.*, *Gorman* v. *City of Woodinville*, 283 P.3d 1082, 1083 (Wash. 2012); *El Cerrito*, 376 P.2d at 532.

[5] In the view of the dissenting justices, a judgment entered without petitioner's participation in the suit would not bind petitioner. Pet. App. 32a-33a. But presumably a judgment quieting title to tribal property would be recorded in the official property records. Section 7.28.010 authorizes the state court to appoint a trustee for absent or nonresident defendants served by publication, but does not provide for appointment of a trustee for a resident tribe that is personally served and specially appears to assert its sovereign immunity. If a sovereign declines to participate in a quiet-title action and the court declines to dismiss the action, Civil Rule 19 could become a tool for entering default judgments against sovereigns that assert their immunity.

there, or take other similar actions that would induce petitioner to file a quiet-title action.

In addition, if a Tribe plans to request that the Secretary take a disputed parcel of land into trust, as petitioner evidently intends here (Pet. App. 3a; J.A. 39), there must be a title examination in connection with the land-into-trust application, which could induce the Tribe to file a quiet-title suit. See 25 C.F.R. 151.13 ("The Secretary may require the elimination of any * * * liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable."). Further, a Tribe, mindful that Congress has the power to abrogate tribal sovereign immunity and desirous of good relationships with its neighbors, may choose to waive its immunity with respect to a quiet-title action, particularly where there has been a good-faith effort to resolve the title dispute prior to suit. And in this case, respondents (or their predecessors-in-interest) could have initiated a quiet-title action any time during the 56-year period between 1957, when they claim the strip was obtained by adverse possession, J.A. 86, and 2013, when Annabell Brown's land was sold to the Tribe.

All of those possible avenues for resolution to one side, however, the Washington Supreme Court improperly relied upon Civil Rule 19 to circumvent petitioner's sovereign immunity.

II. AN EXCEPTION TO IMMUNITY FOR SUITS TO DETERMINE RIGHTS IN IMMOVABLE PROPERTY THAT APPLIES TO OTHER SOVEREIGNS DOES NOT APPLY TO INDIAN TRIBES

For the reasons stated above (pp. 10-24, *supra*), the Washington Supreme Court erred in concluding that tribal sovereign immunity did not bar respondents' quiet-title action on the theory that the court could exercise *in rem* jurisdiction over the land itself. To be sure, if respondents' suit had been brought against a foreign state or a sister state that had purchased real property in Washington, sovereign immunity would not bar the suit because of a special exception or special principles of sovereign immunity in those contexts. But neither the Washington Supreme Court nor respondents in their brief in opposition urged an exception to tribal sovereign immunity by reference to such an immovable-property exception for foreign or sister states.

If this Court nevertheless were to consider that argument, the Court should reject it. This Court has repeatedly held that it is for Congress, not the courts, to fashion any exceptions to tribal sovereign immunity, and any such exception must be clear and unequivocal. Congress has enacted no such exception for real property disputes involving tribally owned land.

A. An Immovable-Property Exception To Sovereign Immunity From Suit Has Been Adopted With Respect To Foreign Sovereigns, And Sovereign Immunity Does Not Bar A Suit Against Sister States

1. Since 1976, the immunity of foreign sovereigns from suit has been governed by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*). The FSIA states a general rule that a foreign state is immune from suit,

see 28 U.S.C. 1604, and a court may exercise jurisdiction over a foreign state only if the suit comes within a statutory exception to that general rule of immunity. See 28 U.S.C. 1330(a), 1605; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Under one such exception, "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights * * * in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4).

The general rule that foreign states are immune from suit in the United States "began as a judicial doctrine" when Chief Justice Marshall held in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), that United States courts had no jurisdiction over an armed ship of a foreign state, even while in an American port. *Kiowa*, 523 U.S. at 759 (citing *Schooner Exchange*, *supra*). The Court's opinion in *Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B.V.*, 461 U.S. at 486. Accordingly, before 1952, the United States followed a policy under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). The *Schooner Exchange* made clear, however, that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V.*, 461 U.S. at 486. This Court therefore "consistently * * * deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions

against foreign sovereigns and their instrumentalities." *Ibid.*

In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity, under which foreign states are granted immunity only for their sovereign or public acts (*jure imperri*), and not for their commercial acts (*jure gestionis*). See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976); see *Verlinden B.V.*, 461 U.S. at 487. In 1976, in response to difficulties in implementing the Tate Letter, see *Kiowa*, 523 U.S. at 759; *Verlinden B.V.*, 461 U.S. at 488-489, Congress enacted the FSIA "to codify the restrictive theory's limitation of immunity to sovereign acts." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 199 (2007).

The immovable-property exception to foreign sovereign immunity in the FSIA was grounded in international practice that preexisted the Tate Letter. See *Permanent Mission of India*, 551 U.S. at 200 (FSIA's immovable-property exception was "meant to codify . . . [a] pre-existing real property exception to sovereign immunity recognized by international practice") (citation and internal quotation marks omitted). Even under the "absolute" theory of sovereign immunity, it was recognized that immunity did not bar certain claims "with respect to real property." Tate Letter (*Alfred Dunhill*, 425 U.S. at 711) ("There is agreement by proponents of both [the absolute and restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property."). The immovable-property exception codified in

the FSIA reflects the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985).

2. For somewhat different reasons, a sister State also would not be entitled to immunity from a quiet-title action unless Washington granted that State immunity. In *Nevada* v. *Hall*, 440 U.S. 410 (1979), the Court held that a State is not entitled to immunity in the courts of another State absent "an agreement * * * between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416; see *Haberman* v. *Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1066-1067 (Wash. 1987), appeal dismissed, 488 U.S. 805 (1988).[6]

Even before *Hall*, the Court had recognized that when a State purchases real property in another State, it does not have immunity from suit with respect to rights to that real property. In *Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924), Georgia had purchased land in Chattanooga, Tennessee, for a railroad yard. *Id.* at 478. Georgia brought suit to enjoin the city from condemning a right of way through the railroad yard on the ground that, *inter alia*, "Georgia has never consented to be sued in the courts of Tennessee." *Id.* at 479. The Court held that "[t]he power of Tennessee * * * to take land for a street is not impaired by the fact that a sister State owns the land for railroad purposes." *Ibid.* "Having acquired land in another State for the purpose of using it in a private capacity," the Court explained,

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[6] In *Franchise Tax Board* v. *Hyatt*, 136 S. Ct. 1277 (2016), the Court divided 4-to-4 on the question whether to overrule *Nevada* v. *Hall*. *Id.* at 1281.

"Georgia can claim no sovereign immunity or privilege in respect to its expropriation." *Id.* at 479-480. Instead, "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership." *Id.* at 480.

B. The Court Should Not Adopt An Immovable-Property Exception To Tribal Sovereign Immunity

The existence of an immovable-property exception in the context of foreign and state sovereign immunity does not mean that such an exception may be fashioned by the courts for Indian tribes. The contexts for those exceptions differ significantly from tribal sovereign immunity.

1. Foreign sovereign immunity is not a judge-made doctrine. Rather, the Judicial Branch has deferred to the determinations of the political Branches—first to the Executive Branch, and now to Congress following enactment of the FSIA. *Verlinden B.V.*, 461 U.S. at 486. Congress can and does act in the sphere of foreign sovereign immunity, *Kiowa*, 523 U.S. at 759, and it has enacted statutory exceptions to foreign sovereign immunity in the FSIA even as it has declined to enact parallel exceptions to the established immunity of Indian tribes. For example, although the FSIA codified the Executive's decision to adopt the restrictive theory of foreign sovereign immunity and therefore does not afford immunity to foreign sovereigns for their commercial activities in the United States, 28 U.S.C. 1605(a)(2), Indian tribes remain immune from suit based on commercial activities both on and off reservation land. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758. The same is true with respect to the FSIA's immovable-property exception. "In both fields, Congress is in a position to weigh and accommodate the competing policy

concerns and reliance interests." *Kiowa*, 523 U.S. at 759.

Similarly, with respect to state sovereign immunity, this Court has recognized that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756. States lack immunity in one another's courts because "each State at the Constitutional Convention surrendered its immunity from suit by sister States." *Bay Mills*, 134 U.S. at 2031. This Court has recognized, however, that the Tribes did not participate in the Constitutional Convention and therefore did not surrender their immunity as part of the plan of the Convention. *Ibid.* ("'[I]t would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits.") (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

2. While the Court has deferred to the Executive Branch and later to Congress in the realm of foreign sovereign immunity, and while the States surrendered their immunity with respect to one another by mutual concession, tribal sovereignty is a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. This Court has held that tribal sovereign immunity is qualified only in that "a tribe's immunity, like its other governmental powers and attributes, [is] in Congress's hands." *Id.* at 2030. Congress could enact a statute that abrogated Indian tribes' immunity from certain quiet-title actions in either state or federal court, as it has done for the United States in the Quiet Title Act, 28 U.S.C. 2409a, and for foreign states in the FSIA, 28 U.S.C. 1605(a)(4). But the Court has properly declined to take it upon itself to fashion exceptions to tribal sovereign immunity, concluding

that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*, 134 S. Ct. at 2037; cf. 28 U.S.C. 2409a(a) (excepting "trust or restricted Indian lands" from the waiver of the United States' immunity from suit under the Quiet Title Act); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 215 (2012).

There is no occasion to depart from that established rule here. As described above (pp. 23-24, *supra*), an Indian tribe's invocation of immunity in a quiet-title suit does not eliminate the possibility that the title dispute will be resolved. And if Indian tribes invoke immunity to avoid adjudication of quiet-title actions and unresolved title disputes become problematic, Congress can "weigh and accommodate the competing policy concerns and reliance interests" and abrogate tribal sovereign immunity in whatever circumstances it sees fit, and subject to whatever conditions it deems appropriate. *Kiowa*, 523 U.S. at 759. Of relevance to this case, for example, although Congress waived the sovereign immunity of the United States to federal-court quiet-title suits in the Quiet Title Act, 28 U.S.C. 2409a(a), it did not waive immunity to such a suit based on adverse possession, 28 U.S.C. 2409a(n); see also 28 U.S.C. 2409a(a) (excepting "water rights" from Quiet Title Act waiver). And Congress enacted a special statute of limitations for actions under the Quiet Title Act. 28 U.S.C. 2409a(g).

If Congress were to consider enacting some form of immovable-property exception to tribal sovereign immunity for off-reservation real property, still further questions would arise concerning the proper scope of any such exception. With respect to foreign sovereign

immunity, for example, pre-FSIA legal scholarship described the immovable-property exception in narrow terms. The Restatement (Second) of Foreign Relations Law of the United States stated that the exception permitted "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." § 68 cmt. d, at 207 (1965). The Restatement explained that it did not include "a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Ibid.*

Foreign states are now subject to a somewhat broader statutory exception to immunity for any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). In *Permanent Mission of India*, the Court noted that Section 1605(a)(4) "does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession" but "focuses more broadly on 'rights in' property," and the Court held that a suit to establish the validity of a tax lien could proceed because it implicates rights in immovable property. 551 U.S. at 198. But at the same time, the Court noted New York City's concession that, even if the city taxes were declared to be valid, the foreign states would be immune from foreclosure proceedings. *Id.* at 196 n.1; see also *Cayuga Indian Nation*, 761 F.3d at 220-221 (holding that tribal sovereign immunity barred foreclosure proceedings to collect unpaid ad valorem property taxes on land owned by Indian tribe); *Oneida Indian Nation of N.Y.* v. *Madison County*, 605 F.3d 149, 156-160 (2d Cir. 2010) (same), vacated and remanded, 562 U.S. 42 (2011).

In sum, under this Court's decisions, whether and to what extent an immovable-property exception to tribal sovereign immunity should be adopted is to be determined by Congress, which can weigh various considerations such as those just discussed and can impose limits and conditions on any such abrogation.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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No. 17-387

IN THE
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR THE CAYUGA NATION, THE SENECA NATION OF INDIANS, THE SAINT REGIS MOHAWK TRIBE, THE CHEROKEE NATION, AND THE PUEBLO OF POJOAQUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should this Court recognize a novel exception to tribal sovereign immunity for quiet-title actions like the one in this case on the ground that such actions are *in rem*?

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INTEREST OF *AMICI CURIAE*[1]

The Cayuga Nation is a federally recognized Indian Nation, recognized as a sovereign Nation in myriad treaties with the United States, including the 1794 Treaty of Canandaigua.

The Seneca Nation of Indians is a federally recognized Indian Nation comprised of more than 8,000 citizens. Part of the historic Six Nations Confederacy, the Seneca Nation has been recognized as a sovereign by the United States since the time of its first treaties with the United States over 220 years ago.

The Saint Regis Mohawk Tribe is a federally recognized Indian Tribe with over 15,600 enrolled tribal members, recognized as a sovereign Nation by the United States in numerous treaties, including the 1796 Treaty with the Seven Nations of Canada.

The Cherokee Nation is the largest federally recognized Indian Tribe, with more than 360,000 enrolled citizens. The Cherokee Nation has been recognized as a sovereign Nation by the United States in numerous treaties, including the 1791 Treaty of

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Holston and the 1866 Treaty with the Cherokees. *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The Pueblo of Pojoaque is a federally recognized Indian Tribe, and one of the historic Indian Pueblos of New Mexico, whose sovereign status has been successively recognized over hundreds of years by the Spanish, Mexican, and United States governments. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240 (1985).

Each of these *amici*—as Indian Nations whose status as separate sovereigns long predates the Constitution—has a strong interest in defending the doctrine of tribal sovereign immunity recognized by this Court's precedents as an essential corollary of their sovereign status. That interest includes defending the doctrine of tribal sovereign immunity against attempts, as in the decision below, to create an exception for *in rem* actions. As an incident of tribal sovereignty, each *amicus* has significant interests in property held by the Tribe itself, which at times has been held by the Tribe for hundreds if not thousands of years. Like other sovereigns, each of the *amici* has a strong interest in the interplay between the doctrine of sovereign immunity from suit and claims that may be made with respect to property, including various claims that may be characterized as actions *in rem*. Each *amicus* regularly defends against incursions on its sovereignty by state and local governments and private parties, including with respect to property held by the Tribe. *Amici* thus have strong interests in defending tribal sovereign immunity in *in rem* actions.

SUMMARY OF ARGUMENT

I. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), reaffirmed that the "baseline position ... is tribal immunity," unless a Tribe waives immunity or Congress abrogates it. *Id.* at 2031. The Court "declined" to begin carving out exceptions, explaining that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Id.* at 2037. The Court should reject the novel *in rem* exception that the Washington Supreme Court created. That exception is without support in this Court's precedents on tribal sovereign immunity. It contradicts this Court's precedents concerning the immunity of the United States and other sovereigns, which recognize that—in every way that matters—a suit against a sovereign's property is a suit against the sovereign. And it is at odds with *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), which held that suits seeking relief that is "the functional equivalent of quiet title" are barred by sovereign immunity. *Id.* at 282. These bedrock principles foreclose any exception from tribal sovereign immunity for *in rem* actions, including the exception for quiet-title actions created by the Washington Supreme Court.

The opinion below rests its contrary rule on a sleight of hand: Washington courts first make "a merits-based determination" about whether a Tribe owns the property. Pet. App. 2a. If not, immunity supposedly is no bar because the action cannot "deprive [the Tribe] of land [it] rightfully own[ed]." Pet. App. 11a (quotation marks omitted). But immunity cannot be dodged by creating a threshold step that asks whether the

otherwise immune defendant (here, the Upper Skagit Indian Tribe) loses on the merits. Indeed, the Court rejected precisely that approach in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), holding that lower courts cannot avoid sovereign immunity by asking, as a threshold question of joinder, whether the sovereign's "claims ha[ve] ... little likelihood of success on the merits." *Id.* at 860. Such "consideration of the merits [i]s itself an infringement on ... sovereign immunity." *Id.* at 864.

The Lundgrens cannot avoid this result by asserting that they lack adequate alternative remedies. To begin, the Lundgrens *have* alternative remedies they could have invoked. And more fundamentally, it is for Congress to decide whether remedies are truly inadequate, and to provide a solution calibrated to any problem it perceives. For decades, litigants likewise claimed that the United States' immunity from quiet-title suits left them with no sure remedy. In the Quiet Title Act of 1972, Congress addressed those concerns by waiving the United States' sovereign immunity—not a blanket waiver, but one with numerous carve-outs and restrictions that protected the United States' sovereign interests. The Court should reject the attempt to bypass Congress's designated role and to treat Indian Tribes differently from other sovereigns.

II. As unpersuasive as the Washington Supreme Court's theory is on the facts here, it cannot possibly justify a broad-based *in rem* exception to tribal sovereign immunity—because the theory does not even *apply* to many types of *in rem* actions litigated across the country. *In rem* actions come in many shapes and

sizes. In some actions, for example, a State or local government may seek to foreclose on tax liens on tribal property. In other actions, a State may seek to acquire tribal property via condemnation. And in still other actions, a plaintiff will file a quiet-title proceeding alleging an ownership interest that arose *after* the Tribe acquired the property. All of these actions indisputably would "deprive [the Tribe] of land [it] rightfully own[ed]," Pet. App. 18a, and would thus fall outside the Washington Supreme Court's newly minted exception. As this Court considers *in rem* jurisdiction's intersection with tribal sovereign immunity, it should be mindful that this case arises on unusual facts that render this case an exceptionally poor vehicle for considering a general *in rem* exception.

ARGUMENT

I. There Is No Exception from Sovereign Immunity for *In Rem* Actions, Including the Quiet-Title Action Here.

The court below held that courts may entertain quiet-title actions that eliminate a sovereign Indian Nation's claims to property "[b]ecause courts exercise *in rem* jurisdiction over [the] property," and thus "the Tribe's sovereign immunity is no barrier." Pet. App. 2a, 10a. But there is no exception from tribal sovereign immunity for actions captioned "*in rem*," and the Court should not create one.

A. *Bay Mills* Is the Starting Point, and Should Be the Ending Point, for Deciding Whether to Recognize a New "*In Rem*" Exception from Sovereign Immunity.

This Court's consideration of the Washington Supreme Court's *in rem* exception begins, and should end, with its recent decision in *Bay Mills*. That case considered another proposed exception from sovereign immunity, for "suit[s] aris[ing] from off-reservation commercial activity." 134 S. Ct. at 2028. *Bay Mills*' rejection of that exception compels the same result here.

As *Bay Mills* explained, "[t]he baseline position, [the Court has] often held, is tribal immunity." *Id.* at 2031. Indian Tribes are "separate sovereigns pre-existing the Constitution." *Id.* at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). And while Indian Tribes have become "'domestic dependent nations,'" they continue to "exercise 'inherent sovereign authority.'" *Id.* (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). One of these "core aspects of sovereignty that tribes possess ... is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 58). This immunity is "a necessary corollary to Indian sovereignty and self-governance," *id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)), given the recognition—dating to the Founding—that it "is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *Id.* (quoting The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton)).

As the Court reaffirmed in *Bay Mills*, there are only two exceptions: where "Congress has authorized [a] suit," and where the Tribe has "waived" its immunity. *Id.* at 2032; *see id.* at 2030–31 ("[W]e have time and again dismissed any suit against a tribe absent congressional authorization (or a waiver)."). Repeatedly, the Court has had the chance to exempt various types of actions from this immunity—for example, conduct "off [the Tribe's] reservation," or "commercial conduct." *Id.* at 2031 (alteration in original) (internal quotation marks omitted). But repeatedly, the Court has declined, "establish[ing] a broad principle" of sovereign immunity "from which [the Court] thought it improper suddenly to start carving out exceptions." *Id.* (citing *Okla. Tax Comm'n*, 498 U.S. at 509; *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 167–68, 172–73 (1977); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)).

In *Bay Mills*, Michigan nonetheless asked the Court to "revisit" that principle, asserting that Tribes' broad sovereign immunity was unwarranted given that "tribes increasingly participate in ... commercial activity, and operate in that capacity less as governments than as private businesses." *Id.* at 2036. Michigan complained that Tribes should not have "broader immunity ... than other sovereigns," including States and "foreign nations[]" after the Foreign Sovereign Immunities Act. *Id.*

The Court rejected that request "for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty that tribes

retain—both its nature and its extent—rests in the hands of Congress." *Id.* at 2037. Congress, *Bay Mills* explained, "has the greater capacity to 'weigh and accommodate the competing policy concerns and reliance interests.'" *Id.* at 2037–38 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)). Hence, "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Id.* at 2039. The Court therefore declined to create a "freestanding exception to tribal immunity," which "would entail both overthrowing our precedent and usurping Congress's current policy judgment." *Id.*

Bay Mills dictates the same result here. The Lundgrens do not argue that the Upper Skagit Indian Tribe waived its immunity, and there is no claim that "Congress has authorized [this] suit" by abrogating sovereign immunity for *in rem* actions generally or quiet-title suits in particular. *Id.* at 2032. Instead, the Lundgrens persuaded the Washington Supreme Court to create an exception grounded in what that court viewed as the "equitable purposes" of its state-law rules of civil procedure, regarded by that court as a relatively "less intrusive assertion of state jurisdiction." Pet. App. 9a, 18a (internal quotation marks omitted). But this type of "policy judgment" is precisely what *Bay Mills* reserved for *Congress* and refused to allow courts to "usurp[]." 134 S. Ct. at 2039. As this Court observed in *Bay Mills*, Congress is active in policing the boundaries

of Indian sovereign immunity and has every ability to address any genuine problem. *See id.* at 2038.[2]

B. Settled Law Confirms that *In Rem* Actions Are Not Excepted from Sovereign Immunity.

The Washington Supreme Court believed that when "there [i]s *in rem* jurisdiction," a court does "not need to address sovereign immunity," and that this Court's settled sovereign-immunity precedent culminating in *Bay Mills* is simply inapplicable. Pet. App. 10a. The court was wrong. A mountain of caselaw establishes that sovereign immunity does not become inapplicable simply because a plaintiff characterizes its suit as an *in rem* action against the sovereign's property.

This Court has so held in cases involving property of the United States. Since the nineteenth century, this Court has recognized that "[t]he same exemption" that bars suits against the United States "extends to the property of the United States, and for the same reasons." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). That is because "there is no distinction between suits

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[2] Indeed, if an exception from sovereign immunity were warranted for some *in rem* cases, only Congress could define its scope. Actions captioned "*in rem*" are no monolith; they come in many different types. *See infra* Part II. While Congress can carefully limit the scope of exceptions it enacts, that is not feasible for judicially created exceptions. An exception for one *in rem* action would immediately invite litigation over what *other* actions fall into that exception (or what other exceptions should be created)—opening up a new, broad front of litigation on tribal sovereign immunity. This Court has wisely declined to start down that path.

against the government directly, and suits against its property." *Id.*

Thus, when Alabama sued to foreclose tax liens on federally owned lands, this Court held that those proceedings "were void," explaining that a "proceeding against property in which the United States has an interest is a suit against the United States." *United States v. Alabama*, 313 U.S. 274, 282 (1941).

Likewise, when Minnesota sought to condemn land for which "the United States owns the fee," the United States was "an indispensable party defendant" because—again—a "proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota v. United States*, 305 U.S. 382, 386 (1939). And because immunity prevented joining the United States, "Minnesota [could] not maintain [its] suit." *Id.* at 387.

More recently, when a bankruptcy trustee argued that "a bankruptcy court's *in rem* jurisdiction overrides [the United States'] sovereign immunity," this Court rejected that argument, explaining that "we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992). A proceeding against a sovereign's property, as here, no less offends immunity than one against its money.

These decisions are based on a commonsense, functional point. While *in rem* suits are formally suits against things, they are *really* suits against the people who claim interests in those things. In this Court's words, the "phrase judicial jurisdiction over a thing is a

customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (quoting *Restatement (Second) of Conflict of Laws* § 56, Introductory Note (1971)). Thus, "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." *Id.* at 207 n.22 (quoting *Tyler v. Court of Registration*, 55 N.E. 812, 814 (Mass. 1900) (Holmes, C.J.)). *In personam* proceedings seek merely to "establish a claim against some particular person," while *in rem* proceedings do so against "any one in the world." *Tyler*, 55 N.E. at 814. That is why, for example, the Constitution requires that any owner, including an Indian Nation, be notified of an *in rem* suit against its property. *See Shaffer*, 433 U.S. at 206 (collecting cases); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 312–13 (1950) (due-process notice requirements do not depend on whether litigation is *in personam* or *in rem*).

Indeed, the "preeminent purpose of ... sovereign immunity is to accord ... the dignity that is consistent with ... status as sovereign entities," recognizing that it is an "impermissible affront to [this] dignity to be required to answer the complaints of private parties in ... courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *accord Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318–19 (2017) (same, as to foreign states); *Bay Mills*, 134 S. Ct. at 2042 (Sotomayor, J., concurring) (same, as to Indian Tribes). In every way that matters, *in rem* suits—just like *in personam* suits—have this effect. When a sovereign Indian Nation receives notice

of an *in rem* action against its property, its only choice is no choice at all: appear and defend, or risk forfeiting property. As this Court has observed, a sovereign is "effectively" "haled into court without its consent ... when ... the object of the suit ... is to reach funds in the ... treasury or acquire ... lands." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) (*VOPA*). This basic point forecloses the Washington Supreme Court's attempt to circumvent immunity via *in rem* jurisdiction.

Consistent with these principles, the United States has correctly recognized, in an *amicus* brief filed in a suit concerning the Cayuga Nation, that there is no *in rem* exception from tribal sovereign immunity. There, a county alleged that the Nation owed property taxes, and it "initiated foreclosure proceedings against certain of the ... Nation's real property." *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. 2014). Immunity was no barrier, the county urged, because of "a distinction between *in rem* and *in personam* proceedings." *Id.* at 221. But the United States explained that "the '*in rem*' nature" of a foreclosure action does not "bear[] on Cayuga's immunity from suit." Letter Br. of United States as *Amicus Curiae* at 4, No. 12-3723, *Cayuga Indian Nation v. Seneca Cty.* (2d Cir. Sept. 30, 2013), Doc. 104-3. The United States deemed "untenable" the "premise that tribal immunity from suits exists only as to *in personam* suits," and it found "no support for the proposition that sovereign immunity is generally inapplicable to *in rem* actions." *Id.* at 5, 8.

The Second Circuit agreed. *Cayuga Indian Nation*, 761 F.3d at 221.[3]

C. This Settled Law Also Forecloses Creating an Exception from Sovereign Immunity for this Quiet-Title Action.

These principles equally foreclose the Washington Supreme Court's view that quiet-title suits may proceed despite an Indian Tribe's assertion of sovereign immunity. These suits, too, inflict the "specific indignity against which sovereign immunity protects"—the Tribe is "haled into court without its consent," on pain of otherwise forfeiting property. *VOPA*, 563 U.S. at 258.

Indeed, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), this Court was express that sovereign immunity bars quiet-title suits involving a sovereign's property. *Coeur d'Alene* held that a Tribe could not seek "declaratory and injunctive relief" concerning lands claimed by the State because such "relief ... is ... the functional equivalent of quiet title" barred by sovereign immunity. *Id.* at 282–83. A three-Justice concurrence agreed that the "Tribe could not maintain a quiet title action ... without the State's consent" because a "court cannot summon a State before it in a private action

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[3] The United States' position was consistent with its brief in a prior case concerning the Oneida Indian Nation of New York. *See* Br. of United States as *Amicus Curiae* at 10 n.4, *Oneida Indian Nation of N.Y. v. Madison Cty.*, Nos. 05-6408, 06-5168, 06-5515 (2d Cir. July 25, 2008), 2008 WL 6086315 ("[E]xcept in certain bankruptcy and admiralty contexts that are not applicable here, the distinction between *in personam* and *in rem* jurisdiction is meaningless with regard to sovereign immunity.").

seeking to divest the State of a property interest." *Id.* at 289 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and concurring in the judgment). This rule is no less applicable to the property of Indian Tribes.

The Washington Supreme Court tried to dodge this clear law via Washington-specific legal fictions. It reasoned that, if a quiet-title plaintiff has a *winning* adverse-possession claim, the Tribe "does not have an interest in the disputed property." Pet. App. 2a. Thus, the court reasoned, "sovereign immunity is no barrier." *Id.* Moreover, the court proposed to undertake this entire "merits-based determination" via Washington's mandatory-joinder rules, *id.*—finding that if the quiet-title plaintiff would prevail, the Tribe was not a "necessary" (much less an "indispensable") party. Pet. App. 13a–14a. By embedding the merits determination in a threshold question about joinder, the court sought to avoid the "jurisdictional barrier[]" that it conceded tribal sovereign immunity would otherwise present. Pet. App. 13a.

That dodge cannot work. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). As to the United States' immunity, this Court has observed that "whether or not the United States is an indispensable party to a judicial proceeding" concerning property in which the United States claims an interest "cannot depend on state law." *United States v. Brosnan*, 363 U.S. 237, 251 (1960). Instead, as a matter of federal law, the "United States is an indispensable party defendant" to any such suit. *Minnesota*, 305 U.S. at 386; *accord Brosnan*, 363 U.S. at

242–43. Likewise, Washington cannot avoid Indian Tribes' sovereign immunity by rearranging its civil procedures.

As legal fictions go, moreover, Washington's is particularly untenable. Even the court below confessed that its approach "put 'the cart before the horse.'" Pet. App. 13a. Sovereign immunity from suit restricts courts' very jurisdiction, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), protecting sovereigns—as just noted—from "being haled into court ... when ... the object ... is to reach ... [the sovereign's] lands." *VOPA*, 563 U.S. at 258. Such immunity is empty if, to establish it, sovereigns must first litigate *and win* on the merits—losing their property if they do not. It cannot possibly matter that the Washington Supreme Court captioned its "merits-based determination" as one under Washington's "Civil Rule 19." Pet. App. 2a, 13a.

Indeed, the Court rejected precisely this approach in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). There, an interpleader action concerning property claimed by the Republic of the Philippines went forward despite the Philippines' assertion of sovereign immunity. *Id.* at 854–55. Applying Rule 19's joinder rules, the lower courts believed that the action could proceed without the Philippines because its "claims had so little likelihood of success on the merits." *Id.* at 860. This Court, however, held that the lower courts had "erred, ... in effect decid[ing] the merits of the [Philippines'] claims." *Id.* at 864. This "consideration of the merits was itself an infringement on ... sovereign immunity." *Id.* To be sure, the Court stressed, courts might properly "disregard [a] frivolous claim" by a

sovereign. *Id.* at 867. But "[h]ere, the claims of the [sovereign] are not frivolous; and the [lower courts] should not have proceeded on the premise that those claims would be determined against the sovereign." *Id.*; *see also id.* at 868 ("[I]t was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by [a sovereign] that was entitled by its sovereign status to immunity from suit.").

Pimintel forecloses the Washington Supreme Court's approach below. While that court believed that the Upper Skagit would lose on the merits, there is no finding that the Upper Skagit's claims of ownership based on a statutory warranty deed are *frivolous*. Pet. App. 3a. And the Washington Supreme Court's joinder analysis, set forth at pages 14a through 16a of the Petition Appendix, is *indistinguishable* from the merits resolution of an adverse-possession claim; indeed, the court expressly characterized it as a "summary judgment" analysis. Pet. App. 14a. As *Pimintel* recognized, if the doctrine of sovereign immunity is to have any meaning, it must forbid importing a merits decision into threshold questions of joinder.[4]

If any doubt remained, *Coeur d'Alene* demonstrates that the Washington Supreme Court's fiction is not the law. *Coeur d'Alene*, as noted, explained that sovereign immunity would bar a quiet-title action brought by a Tribe against a State. *See supra* at 13. In *Coeur d'Alene*,

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[4] *Pimintel*'s rule also disposes of concerns that Tribes will use their immunity in bad faith, claiming ownership of property with no genuine basis and then asserting immunity to preclude challenges. Frivolous claims need not be credited. *See* 553 U.S. at 867–68.

the Tribe relied, in part, on "claimed ownership of the submerged lands pursuant to unextinguished aboriginal title." 521 U.S. at 265. So the Tribe could claim, like the Lundgrens, that the State really had "no interest" and thus "sovereign immunity [wa]s no barrier." Pet. App. 2a, 13a–14a. But in *Coeur d'Alene*, this Court did not find that this claim rendered sovereign immunity less of a barrier. And here, the Lundgrens' similar claim is no more relevant.

D. The Claim that the Lundgrens Lacked Alternative Remedies Is Neither Relevant nor True.

The Lundgrens at the petition stage, and the Washington Supreme Court below, made much of the claim that the Lundgrens lacked alternative remedies. Br. in Opp. 7 (asserting that "[t]he only remedy" the Lundgrens had was the "narrow state law remedy" of a quiet-title action); Pet. App. 17a (asserting that the Lundgrens had no other "adequate remedy"). But while *Bay Mills* indeed stated that the Court there "need not consider" the result if no existing cause of action provided a remedy, 134 S. Ct. at 2036 n.8, this Court's precedent supplies a clear answer in those circumstances too. When a litigant claims it has "a right without any remedy" due to sovereign immunity, the *remedy* is to "seek appropriate legislation from Congress." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 514 (1991); *see Bay Mills*, 134 S. Ct. at 2030–31 (similar); *Kiowa*, 523 U.S. at 758 (similar).

That point is evident from the history of the federal government's immunity to quiet-title actions. "Only

upon passage of the [Quiet Title Act] did the United States waive its immunity with respect to suits involving title to land." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983). Before that, private landowners made the same claims as the Lundgrens, stressing that they had no sure remedy; their only "means of obtaining a resolution of the title dispute" was "to induce the United States to file a quiet title action against them, or ... petition Congress or the Executive for discretionary relief." *Id.* And when Congress finally waived the United States' immunity in 1972, it did not do so wholesale. Congress limited the waiver by, for example, requiring that quiet-title actions be brought in federal court and by providing the United States the option to pay compensation in lieu of surrendering ownership. 28 U.S.C. § 2409a(a)–(b).

This history confirms that the Washington Supreme Court went astray when it invented an *in rem* exception to sovereign immunity for quiet-title actions. It has *always* been true that sovereign immunity complicates disputes regarding property ownership. If the complications prove intolerable, the answer is to seek legislation from Congress, as with the Quiet Title Act—giving Congress the opportunity to weigh the competing policy concerns regarding Indian lands. *Cf. Block*, 461 U.S. at 283. The position of the Lundgrens and the Washington Supreme Court, at bottom, is that Indian Tribes should be treated *differently* from other sovereigns—with their immunity judicially abrogated, bypassing the authority vested in Congress to determine whether, and to what extent, a limit on immunity is appropriate. The Court should reject this

attempt to create an Indian-only exception from bedrock immunity principles.

In any event, the claim that the Lundgrens lack alternative remedies is not even true. As the Upper Skagit show, the Lundgrens did have alternative remedies, including 50 years to file a quiet-title suit before the Upper Skagit purchased the property, and today, state-law claims for money had and received and for unjust enrichment. *See* Pet'r's Br. 35–36 (citing cases). Predictably, the Lundgrens will say that these alternatives are less effective. But as the foregoing discussion demonstrates, often "sovereign immunity bars ... the most efficient remedy." *Okla. Tax Comm'n*, 498 U.S. at 514. Yet immunity applies all the same. *Id.*

Nor can the Lundgrens prevail by seeking to sow doubt over whether, on the facts here, particular remedies would be available under Washington law. The Lundgrens did not even *attempt* to invoke the remedies they now claim are inadequate. This quiet-title action was their first and only stop. Even in the context of exhaustion of administrative remedies, a party that failed to exhaust must do more than assert that administrative remedies *might* be futile. "The burden ... rests with th[at party] ... to demonstrate" that *in fact* "administrative review" would have been "futil[e]." *Honig v. Doe*, 484 U.S. 305, 327 (1988). That is all the more true where the interests at stake are not administrative procedures, but tribal sovereignty and the "special justification" needed before this Court will consider abandoning its precedent recognizing the categorical sovereign immunity held by Indian Tribes,

absent waiver or congressional abrogation. *Bay Mills*, 134 S. Ct. at 2036 n.8 (quotation marks omitted).

E. *Yakima* Concerned States' Jurisdiction to Tax, Not Tribes' Immunity from Suit.

The Washington Supreme Court believed, incorrectly, that its *in rem* exception from sovereign immunity found support in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 264–65 (1992)—in particular, the statement that "because the jurisdiction [in *Yakima*] [wa]s *in rem* rather than *in personam*, it ... assuredly" did not produce the "'checkerboard' effect" condemned by the Court's prior opinion in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and "it is not impracticable either." *Yakima*, 502 U.S. at 264–65; *see* Pet. App. 8a–9a.

Parsing this statement requires a deep dive into *Yakima* and *Moe*—ably provided in the Upper Skagit's brief, *see* Pet'r's Br. 17–22, and which *amici* will not repeat. But no such excursion is necessary to see why *Yakima*'s statement is inapplicable here. Two different doctrines can protect Indian Tribes, as sovereigns, from States' reach. First, States in some circumstances lack jurisdiction "to apply their substantive laws to tribal activities"—in which case, States are forbidden from imposing mandates on Tribes *at all*. *Kiowa*, 523 U.S. at 755. Second, Tribes also possess sovereign "immunity from suit." *Id.* This sovereign immunity is entirely independent from the limits on States' regulatory jurisdiction: A "State may have authority to [apply its] laws to [a Tribe's] off-reservation conduct," yet the Tribe may still "enjoy[] immunity from suit" to enforce

compliance with those laws. *Id.*; *cf. Okla. Tax Comm'n*, 498 U.S. at 514 (noting concerns that, in combination, these rules can give States "a right without any remedy").

Yakima concerned only the first limit, on States' regulatory jurisdiction. The question presented was whether "the County ... may *impose* an ad valorem tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land." 502 U.S. at 253 (emphasis added). *Yakima*'s statement about *in rem* jurisdiction came solely in answering this question. This case, however, concerns the second limit—sovereign immunity from suit. There "is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. The Washington Supreme Court erred in interpreting a statement about the first limit as resolving a question under the second.[5]

To be sure, *Yakima*'s recitation of the procedural history noted that the county had "proceeded to foreclose on properties ... for which [these] taxes were past due." 502 U.S. at 256. But the Tribe did not raise sovereign immunity as a defense. This Court properly does not regard its prior cases as establishing precedent concerning "[q]uestions which merely lurk in the record, neither brought to the attention of the [C]ourt nor ruled

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[5] This Court has sometimes characterized the limit on States' jurisdiction to regulate Tribes as an "immunity." *See, e.g., Yakima*, 502 U.S. at 259. But regardless of the label used, the point is the same. These limits are different, each independent of the other.

upon." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quotation marks omitted).

II. Because Actions Captioned "*In Rem*" Come in Many Different Types, the Court Should Not Create a Catchall *In Rem* Exception.

This case should end with the fundamental point that no *in rem* exception from sovereign immunity exists, and *Bay Mills* forbids the Court from creating one. But as this Court considers *in rem* jurisdiction's intersection with tribal sovereign immunity, it should be mindful that this case arises on unusual facts that render this case an exceptionally poor vehicle for considering a broad-based *in rem* exception.

The Washington Supreme Court held that the Lundgrens had "acquired ownership by adverse possession long *before* the property was purchased by the Tribe," deeming this case comparable to one where the Tribe "never possessed the land" or had recognized ownership rights free from the Lundgrens' claims. Pet. App. 11a, 14a.[6] Those assertions are what allowed the Washington Supreme Court to aver that the Upper Skagit had "no interest" recognized in the law, and thus "never had land to lose." Pet. App. 11a, 13a. As explained above, that fiction is untenable even on this case's facts. *See supra* at 14-16. And regardless, the Washington Supreme Court's approach cannot justify a general *in rem* exception. Indeed, the Washington Supreme Court's theory does not even purport to *apply*

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[6] To be clear, however, *amici* do not understand the Washington Supreme Court to have found as fact that the Upper Skagit never had possession of the land at issue.

in most circumstances where courts address *in rem* jurisdiction's intersection with sovereign immunity.

In rem cases come in many flavors, each raising different arguments. Some determine ownership, confirming some property interests while destroying others. Such cases can arise as quiet-title actions, but also in interpleader and actions seeking injunctions or declaratory judgments. *See, e.g., Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 984 (N.M. 2016) (declaratory judgment); *First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1045 (Okla. 2013) (interpleader). In others, tribal property is sought to be acquired for public use via eminent domain. *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 693–94 (N.D. 2002). In still others, a State claims that the Tribe owes unpaid taxes and seeks to enforce the alleged liability by foreclosing on liens on tribal property. *Cayuga Indian Nation*, 761 F.3d at 220; *Wis. Dep't of Nat. Res. v. Timber & Wood Prods. Located in Sawyer County*, No. 2017AP181, 2017 WL 6502934, at *1 (Wis. Ct. App. Dec. 19, 2017). Such actions, too, can concern not just real property, but personal or intangible property. *See, e.g., id.* (timber and wood products); *First Bank & Tr.*, 313 P.3d at 1045 (bank accounts).

What these diverse cases share is that in virtually none of them is there even a colorable argument that the Tribe had "no interest" recognized in the law, and thus "never had [anything] to lose." Pet. App. 11a, 13a. Instead, in nearly all cases, Tribes have a possession interest or recognized ownership interest that long predates the *in rem* suit. *Cf. California v. Deep Sea*

Research, Inc., 523 U.S. 491, 507 (1998) (in admiralty context, States' sovereign immunity extends where "State possess[es] the disputed res").[7]

Foreclosure and condemnation cases are particularly clear examples. In foreclosure cases, it is typically undisputed that the Tribe owns the property and the State is trying to *take* it. *See, e.g., Cayuga Indian Nation*, 761 F.3d at 220 (county attempting to "foreclos[e] upon certain real property owned by ... the Cayuga Indian Nation"). As noted, the law is clear that the United States' immunity bars similar foreclosure actions. *See Alabama*, 313 U.S. at 281–82.

Indeed, sovereign immunity's application is especially clear as to foreclosure suits because they are merely stand-ins for suits that name Tribes directly. Foreclosure cases arise when Tribes allegedly owe a sum of money. *E.g., Cayuga Indian Nation*, 761 F.3d at 220; *Wis. Dep't of Nat. Res.*, 2017 WL 6502934, at *10–11. Rather than sue the Tribes directly—suits sovereign immunity would obviously bar—States and their subdivisions attempt to collect by extracting the same amount from tribal property. Sovereign immunity prohibits suits whose object is to "reach funds in the [sovereign's] treasury or acquire [its] lands," *VOPA*, 563 U.S. at 258-59, and it certainly prohibits States from

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[7] *Deep Sea Research* does not hold that, outside of admiralty, immunity applies *only* where the property is in the sovereign's possession. Its possession requirement stemmed from the "interaction between the Eleventh Amendment and the federal courts' *in rem* admiralty jurisdiction." 523 U.S. at 502. It does, however, make clear that immunity applies *at least* where the sovereign has possession.

acquiring a sovereign's lands as a *substitute* for reaching funds in its treasury. Thus, before the Foreign Sovereign Immunities Act narrowed foreign states' immunity in 1976, the *Restatement (Second) of Foreign Relations Law* could proclaim that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Restatement (Second) of Foreign Relations Law* § 65 cmt. d (1965).

Condemnation is another strong case. Condemnation proceedings likewise acquire—they take—interests in land concededly owned and possessed by the sovereign. *Cf. Minnesota*, 305 U.S. at 386 (The United States "is confessedly the owner of the fee of the Indian allotted lands.... As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party."). So, even on the theory adopted by the Washington Supreme Court, tribal sovereign immunity would bar such suits. *See id.*[8]

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[8] States sometimes argue that *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924)—a condemnation case—creates an *in rem* exception from sovereign immunity that extends to Indian Tribes. *See Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot. ex rel. Bd. of Tr. of Internal Imp. Tr. Fund*, 78 So. 3d 31, 33–34 (Fla. Dist. Ct. App. 2011); *Cass Cty.*, 643 N.W.2d at 693–94. That is incorrect. *City of Chattanooga* held that Tennessee could acquire, by condemnation, certain land owned in Tennessee by Georgia. 264 U.S. at 479. *City of Chattanooga* turned on the "consent" that States have provided to condemnation actions brought by another "sister state[]." *Id.* at 479–80. This Court has found a "surrender of immunity from suit by sister States" as "implicit" in the Constitutional Convention—a surrender rendered "plausible [by]

In fact, the Washington Supreme Court's "no interest" theory does not even work for most quiet-title-type actions determining property ownership. Sometimes, for example, plaintiffs will claim to have acquired title via adverse possession *after* the Tribe bought the property. *Cf. Armijo v. Pueblo of Laguna*, 247 P.3d 1119, 1122 (N.M. 2010) (plaintiff sought to quiet title against Tribe despite "prior quiet title decree" involving the Tribe's "predecessor in title" (quotation marks omitted)). Alternatively, an interpleader action may seek a judicial determination as to control of "tribal funds placed within the jurisdiction ... of a ... court." *First Bank & Tr.*, 313 P.3d at 1056. In many such cases, the Tribe had—at some point—an undisputed possession or ownership interest. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (holding that Indian Tribes are immune from interpleader actions).

These varied cases reinforce a deeper point. The reason that the Washington Supreme Court's *in rem* exception is facially inapplicable to so many *in rem* cases is that the exception itself is bankrupt. It cannot be squared with this Court's precedents, or the basic immunity principles they reflect. The Court should reject this exception in this case, and everywhere else it might be suggested.

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the mutuality of that concession." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991). But for Indian Tribes, that surrender never happened. *Id.* The appropriate analogy for Tribes is instead the United States—which, as noted above, is immune from condemnation suits by States. *See supra* at 10.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

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No. 17-387

IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN, ET VIR,

Respondents.

On Writ of Certiorari to the Washington Supreme Court

BRIEF OF *AMICI CURIAE* THE FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PUYALLUP TRIBE OF INDIANS, AND SKOKOMISH INDIAN TRIBE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are federally recognized Indian tribes that historically suffered devastating losses of land as a result of treaty cessions and the allotment policy. Each is now seeking to restore its land base so that it is sufficient to sustain the tribe's culture and society and meet its governmental responsibilities. This often requires that *Amici* purchase lands in fee, on- and off-reservation.

For example, *Amicus* Fond du Lac Band of Lake Superior Chippewa Indians ("the Band") owns land in Minneapolis, Minnesota on which it provides pharmaceutical health care services to tribal members living in the Minneapolis area. Like the Band, many other Indian tribes have members who live in urban areas. Indeed, many Indians were relocated from their Reservations in the 1950s as part of the federal relocation programs that moved Indian people to large urban areas for jobs and training. *See Cohen's Handbook on Federal Indian Law* § 1.06, at 87-89 (Nell Jessup Newton ed., 2012). The Band also owns fee land in the City of Duluth. There, it operates the Center for American Indian Resources, an ambulatory care facility providing a broad range of health care services to tribal members and other Indians who are part of Duluth's large Indian community. *See* Lisa Kaczke, *Fond du Lac Band Dedicates New $14 Million Center in Duluth,* Duluth News Trib. (Dec. 10, 2016)

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for *Amici* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, as reflected by the letters of consent filed with the Clerk.

http://www.duluthnewstribune.com/news/4177211-fond-du-lac-band-dedicates-new-14-million-center-duluth. The Band also acquired fourteen acres of land along the shores of Lake Superior, in Douglas County, Wisconsin, through the General Services Administration ("GSA") excess land process. *See* 25 U.S.C. § 5324(f)(3), which it now holds in fee. These lands, called Wisconsin and Left Hand Point, are the site of a principal Fond du Lac village that was occupied by the Band for several hundred years. This land was granted to Fond du Lac Chief Osaugie under the Treaty of LaPointe, 10 Stat. 1109 (Sept. 30, 1854), and his remains and those of many other Fond du Lac Band members are buried on this land. In the early 1900s, several private companies claimed the land and the Band's people were forcibly removed from it. *See Lemieux v. Agate Land Co.*, 214 N.W. 454, 458-59 (Wis. 1927). The federal government later condemned the site and used it as a Coast Guard facility for a number of years until it was declared excess, and the Band was able to reacquire it from the GSA.

Amicus Puyallup Tribe, located in Washington State, has acquired land off-reservation in fee to protect critical fisheries and fish-rearing habitat that is necessary to sustain the Tribe's fishing rights under the Treaty of Medicine Creek, art. 3, 10 Stat. 1132 (Dec. 26, 1854), as well as for camping, youth activities, and community events. These lands range in distance from adjacent to the Reservation boundaries to, in some cases, thirty to forty miles from the Reservation.

Amicus Skokomish Tribe, also located in Washington State, acquired approximately 500 acres of off-reservation land in fee as a part of a Federal Energy Regulatory Commission-approved settlement with a hydroelectric company. *See* Order on Remand, *City*

of Tacoma, 132 FERC ¶ 61,037 (2010). This land is utilized for forestry activities, a campground, and as an important site for ceremonial activities. It is now in trust, but the process to put the land into trust took years.

The Skokomish Tribe was also gifted a 160-acre parcel of fee land located off Reservation, along the Skokomish River, for conservation purposes. This land is critically important to the restoration of habitat for endangered species, which include chinook and steelhead salmon. All of this land is unquestionably within the Skokomish Tribe's aboriginal territory. *United States v. Washington*, 384 F. Supp. 312, 377 (W.D. Wash. 1974) (Finding No. 137); *United States v. Washington*, 626 F. Supp. 1405, 1489 (W.D. Wash. 1985) (Finding No. 353), *aff'd sub nom. United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. 1985). Furthermore, due to persistent flooding, only 50% of the original Skokomish Reservation is habitable and buildable. Thus, the Tribe now has no other choice but to acquire other land off-reservation in order to meet the current and future needs of its community. All these land acquisitions will be in fee with the goal of having the United States eventually take them in trust. The reacquisition of these lands in fee and trust status advances not only tribal self-determination goals but also protects the Tribe's cultural connection to its ancestral homelands.

Amici Tribes share an interest in ensuring that their lawful possession of lands as governments cannot be challenged by opponents intending to undermine the Tribes' rights and ongoing efforts to restore a land base as needed to "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

STATEMENT OF THE CASE

The Washington Supreme Court entered a judgment affirming the state trial court's decision that the Upper Skagit Indian Tribe could not assert tribal sovereign immunity against a state court action, brought by private parties, to quiet title to lands held in fee by the Tribe. The court reasoned that under this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992), a tribe is not immune from *in rem* actions brought against its fee lands and that Washington state precedent supported this conclusion.

To make that determination, the court relied on this Court's ruling in *County of Yakima* that the Burke Amendment to the General Allotment Act allows a county to impose *ad valorem* taxes on tribally-owned fee lands on the reservation. *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573 (Wash. 2017). The Washington Supreme Court found that *County of Yakima* "reached that conclusion by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court [sic] had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." *Id.* (also citing *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996) (en banc)). This was the entirety of the Washington Supreme Court's analysis of the *County of Yakima* decision.

The court also relied on state court precedent. The Washington Supreme Court had previously opined that tribal sovereign immunity was not implicated by a quiet title action against tribally-owned land because such an action "is 'a much less

intrusive assertion of state jurisdiction over reservation fee patented land' than taxing and foreclosing fee lands . . ." *Id.* (quoting *Anderson*, 929 P.2d at 385). And an intermediate state appellate court had found that state court jurisdiction over a quiet title action "does not offend the Tribe's sovereignty" as under Washington state law, a quiet title action is a proceeding *in rem* against the tribe's property, not against the tribe itself. *Id.* at 573-74 (quoting *Smale v. Noretep*, 208 P.3d 1180, 1180 (Wash. Ct. App. 2009)).

SUMMARY OF ARGUMENT

The Washington Supreme Court's ruling ignores the fundamental principles of tribal sovereign immunity articulated by this Court, which are decisive here. Tribal sovereign immunity is an aspect of tribal inherent sovereignty that can only be abrogated by Congress. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)). That immunity applies both on and off the reservation, *id.* at 2031 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)), and to commercial and noncommercial activities alike, *id.* Its scope and application in any particular circumstance is generally determined by analogy to the immunity of other sovereigns, such as the state and federal governments. *See U.S. Fid. & Guar.*, 309 U.S. at 512; *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017).

The Washington Supreme Court, instead of following these rules, carved out a novel exception to tribal sovereign immunity in *in rem* proceedings, relying on *County of Yakima*, a case that did not deal with tribal sovereign immunity. *County of Yakima* described the extent of state authority to tax fee land on the reservation under the General Allotment Act, but did

not attempt to describe the extent of state authority to vindicate those rights, much less address State authority to adjudicate private disputes with tribes over the ownership of fee land. Nor does *County of Yakima* permit a state court to exercise jurisdiction over a tribe that possesses immunity from suit simply because the action is deemed *in rem* under state law.

The proper rule is that sovereign immunity applies to *in rem* actions under the basic principle that sovereign immunity bars a lawsuit that seeks to divest a government of its property, no matter what its ostensible form. *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261, 268-69 (1997); *see The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) ("there is no distinction between suits against the government directly, and suits against its property"). Even if the suit is not against the government directly, it is barred by sovereign immunity if it is "in substance and effect . . . one against the [government] without its consent." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962). This rule, which has been applied in other legal contexts, *see, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998), applies equally here.

ARGUMENT

I. UNDER SETTLED FEDERAL LAW, SOVEREIGN IMMUNITY IS A CORE ASPECT OF TRIBAL SOVEREIGNTY THAT IS NOT SUBJECT TO DIMINUTION BY THE STATES.

A. The Doctrine Of Tribal Immunity Is Settled Federal Law, And Federal Law Determines Its Scope And Extent.

We begin with the first principles of tribal sovereign immunity. "Indian tribes are domestic dependent

nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks and citations omitted). Their sovereignty includes "the 'common-law immunity from suit traditionally enjoyed by sovereign powers,'" *id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)), which is "a necessary corollary to Indian sovereignty and self-governance," *id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)). "[T]he qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands." *Id.* (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)); *accord id.* at 2040 (Sotomayor, J., concurring) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). Tribal immunity applies to both commercial and noncommercial activities, on tribal lands on and off the reservation, *id.* at 2031 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)), and to suits brought in state court by private parties and the States themselves, including actions brought to enforce state laws, *id.* (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 167-68 (1977), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509-10 (1991)). As the Court explained in *Bay Mills*, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them" and "[t]hat is because . . . tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Id.* (quoting *Kiowa*, 523 U.S. at 756). Applying these principles, the Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a [tribal]

waiver)." *Id.* at 2030-31 (first alteration in original) (quoting *Kiowa*, 523 U.S. at 756).

The bounds of tribal sovereign immunity set forth in this Court's decisions generally match those of federal and state immunity. The Court held long ago that the same "public policy . . . exempt[s] the dependent as well as the dominant sovereignties from suit without consent," *U.S. Fid. & Guar.*, 309 U.S. at 512, and therefore "the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Id.* at 514. And the Court's ruling that tribal immunity applies to tribal operations that may be designated commercial or for profit, *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 755), parallels the rule that state immunity extends to governmental activity that "involves conduct that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of market participants." *Id.* at 2041 (Sotomayor, J., concurring) (internal quotation marks omitted) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999)).[2] Similarly, the distinction between the applicability of substantive law to a tribe and the tribe's immunity from a suit brought to enforce that law, *see Bay Mills*, 134 S. Ct. at 2031, also applies to States, *Alden*, 527 U.S. at 730-32 (Congress

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[2] As this Court has made plain, although state sovereign immunity is provided for in the Eleventh Amendment, the principles of state sovereign immunity are derived from the fundamental nature of sovereignty that, in the case of the States, predates the Constitution. *Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

lacks authority to abrogate a State's immunity from suit in its own courts, but the State remains obligated to comply with federal law); *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (Congress did not validly abrogate state sovereign immunity from an action for money damages brought by a private party under Title I of the Americans with Disabilities Act, but the States are still subject to the standards set forth therein). And most recently, in *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017), the Court found "no reason to depart from . . . general rules" of sovereign immunity to determine whether tribal immunity protected tribal employees from tort lawsuits arising from actions taken in the scope of their employment off-reservation. Applying those rules, the Court held that the Connecticut Supreme Court had erred in "extend[ing] sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees." *Id.* at 1291-92 (citing *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985)).

Symmetry also exists with respect to the inability of States and Tribes to sue one another. Tribal immunity applies to suits brought by states against tribes, *Bay Mills*, 134 S. Ct. at 2031, and State immunity applies to actions brought by tribes against States, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991). In *Blatchford*, the Tribe argued that the States had waived their immunity from suits brought by tribes when they adopted the federal Constitution. The Court held otherwise, ruling that while the States surrendered their immunity from suits by sister States when they submitted to the constitutional scheme, the "mutuality of . . . concession" that occurred between the States at the constitutional convention did not include Indian tribes, and therefore the States did not surrender their immunity for the benefit of the

tribes, nor did the tribes surrender their immunity to the States. *Id.* at 782 (cited in *Bay Mills*, 134 S. Ct. at 2031; *Kiowa*, 523 U.S. at 756; *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261, 268-69 (1997)).

As these decisions show, the bounds of tribal immunity are determined by application of the common law principles set forth in this Court's decisions on sovereign immunity, particularly those that define federal and state immunity. As we show next, the Washington Supreme Court ignored virtually all of that precedent, and in so doing, erred.

B. The Washington Supreme Court Erred By Ignoring This Court's Sovereign Immunity Decisions, And Relying Instead On A Decision In Which Immunity Was Not At Issue.

Instead of applying the principles of sovereign immunity set forth in this Court's decisions to determine the applicability of tribal immunity to the quiet title action brought by the Lundgrens against the Upper Skagit Indian Tribe, the Washington Supreme Court relied almost exclusively on *County of Yakima*, in which neither sovereign immunity, nor the settled principles just recited, were even mentioned.

In *County of Yakima*, the Court held that a county could impose an *ad valorem* tax on lands owned in fee by an Indian tribe, 502 U.S. 251, 266-68 (1992), but not an excise tax on the sale of those lands, *id.* at 268-70. The Court reasoned that Congress had authorized the application of *ad valorem* taxes to tribally-owned fee lands in § 6 of the General Allotment Act, as amended by the Burke Act of 1906, including its

proviso,[3] 25 U.S.C. § 349, and by making the lands alienable and encumberable under § 5 of the General Allotment Act, 25 U.S.C. § 348.[4] *Cnty. of Yakima*, 502 U.S. at 264, 267-68.[5] In so holding, the Court rejected

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[3] Section 6, as amended by the Burke Act of 1906, including its proviso, provides in pertinent part as follows:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . .

Id.

[4] Section 5 of the General Allotment Act provides in pertinent part as follows:

> [A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . .

Id.

[5] The Court held that the county's "ad valorem tax constitutes 'taxation of . . . land' within the meaning of the General Allotment Act and is therefore prima facie valid," and then went on to reject the Court of Appeals' ruling that the tax could be invalidated if the Tribe established on remand that under *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S.

the argument made by the Tribe and the United States that *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), "repudiate[d] the continuing jurisdictional force of the General Allotment Act." *Cnty. of Yakima*, 502 U.S. at 261. The Court instead determined that *Moe* had held that § 6 of the General Allotment Act, as amended by the Burke Act (without considering the proviso), did not authorize a State to exercise *in personam* jurisdiction to impose excise taxes on Indians on fee lands on the Reservation (other than on the original Indian allottee). 502 U.S. at 261-62. *Moe*'s holding was based on Congress's modern-day rejection of checkerboard regulatory schemes on Indian reservations, which – if applicable – would have resulted in an "almost surreal" outcome under which the State could tax tribal members *in personam* anywhere in the Reservation, if they owned fee land. *Id.* at 262-63 (quoting *Moe*, 425 U.S. at 478-79). In contrast, the *County of Yakima* Court explained, its decision on *ad valorem* taxes was not "*Moe*-condemned" because "the jurisdiction is *in rem* rather than *in personam*" and did not result in a checkboard pattern of jurisdiction on the Reservation. *Id.* at 264-65. In sum, *Moe*, which foreclosed uneven *in personam* taxation on the Reservation, did not preclude the imposition of taxes directly on fee lands on the Reservation.

Although *County of Yakima* says not one word about tribal sovereign immunity, the Washington Supreme Court interpreted it to mean that "[a] court exercising in rem jurisdiction is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign

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408 (1989), it had a "protectible interest" against the imposition of the tax. *Cnty. of Yakima*, 502 U.S. at 266-68 (alteration in original).

immunity." *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573 (Wash. 2017). In the court's view, *County of Yakima* determined that the county could impose an *ad valorem* tax on on-reservation fee land under the General Allotment Act "by characterizing the county's assertion of jurisdiction over the land as in rem, rather than an assertion of in personam jurisdiction over the Yakama Nation. In other words, the Court [sic] had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." *Id.*[6]

That is a non sequitur. *County of Yakima* addressed only a county's right to tax tribally-owned fee land, not whether Congress had abrogated tribal sovereign immunity to enable the county to enforce that tax, which would require that Congress "'unequivocally' express that purpose." *Bay Mills*, 134 S. Ct. at 2031 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)). "There is difference between the right to demand compliance with state laws and the means available to enforce them." *Id.* (quoting *Kiowa*, 523 U.S. at 755; *accord Citizen Band Potawatomi*, 498 U.S. at 513-14; *Santa Clara Pueblo*, 436 U.S. at 57-59 (Indian Civil Rights Act imposed substantive civil rights obligations on tribes but did not abrogate their

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[6] The same interpretation has been adopted in a small number of state decisions and fails there for the same reasons described here. *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 691-93 (N.D. 2002) (citing *Cnty. of Yakima*, 502 U.S. at 264-66 and *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 385-87 (Wash. 1996) (en banc) (also relying on *Cnty. of Yakima*)); *Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees*, 78 So.3d 31, 33-34 (Fla. Ct. App. 2011) (relying on *Cass Cnty. Joint Water Resource Dist.* and *Cnty. of Yakima*).

sovereign immunity from suits to enforce those rights in federal court). In *Citizen Band Potawatomi*, the Court applied that principle to state taxation of Indian tribes, holding that although "tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smoke-shops on reservation lands," 498 U.S. at 513; *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159-60 (1980), the State could not sue a Tribe to enforce that right, because the Tribe was protected by sovereign immunity, 498 U.S. at 509-11, 513-14. Addressing off-reservation gaming in *Bay Mills*, the Court reached the same conclusion, holding that a State has the legal right to regulate a tribe's off-reservation actions, but lacks the ability to sue the tribe directly to enforce that right. 134 S. Ct. 2034-35. These holdings reject the Washington Supreme Court's interpretation of *County of Yakima* because they distinguish between the appealability of state law and its enforceability against an immune sovereign.

Furthermore, a state court's bare assertion of *in rem* jurisdiction cannot abrogate tribal sovereign immunity because only explicit congressional authorization can do so. *Bay Mills*, 134 S. Ct. at 2031; *see Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) ("Because tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether [a plaintiff's] claim is asserted *in rem* or *in personam*.") (citing *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007)). *In rem* jurisdiction is based on the court's power over property within its territory, rather than the court's authority over a defendant's person, as in *in personam* jurisdiction. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983); *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). But establishing *in rem*

jurisdiction in a case does not abrogate tribal sovereign immunity. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992) (rejecting the "argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity"). Because "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court," *Mennonite Bd. of Missions*, 462 U.S. at 796 n.3 (quoting *Shaffer*, 433 U.S. at 206), a court can exercise *in rem* jurisdiction over a sovereign property owner only if its immunity has been abrogated or waived. Finally none of the controlling principles of tribal sovereign immunity stand for the proposition that tribal sovereign immunity does not apply in *in rem* proceedings. *See Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 221 (2d Cir. 2014) (citing *Bay Mills*, 134 S. Ct. at 2031) (declining to draw "novel distinctions" in tribal sovereign immunity doctrine based on *in rem* and *in personam* jurisdiction).

In addition, the Washington Supreme Court's decision rests on the faulty premise that *County of Yakima*'s determination that the imposition of a county *ad valorem* tax is an exercise of jurisdiction *in rem*, 502 U.S. at 264-65, also applies to a quiet title action that a state court determines to be *in rem*, *Lundgren*, 389 P.3d at 865 (citing *Phillips v. Tompson*, 131 P. 461 (Wash. 1913)). It does not. In the first place, *County of Yakima* said nothing about the status of quiet title actions. Second, in *Nevada v. United States*, 463 U.S. 110 (1983), decided before *County of Yakima*, this Court stated expressly that "quiet title actions are *in personam* actions." *Id.* at 143-44. Furthermore, if a state law ruling on whether an action is *in rem* were determinative of the applicability of the federal law doctrine of tribal sovereign immunity, it would give States carte blanche to diminish tribal sovereign

immunity without any congressional authorization. That result is contrary to federal law. *See Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). It would also shatter the national uniformity of a federal legal doctrine. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-47 (1989) (rejecting the application of state-law definitions to the federal Indian Child Welfare Act in part because Congress did not intend such a "lack of nationwide uniformity" in a statute applicable to all Indian tribes). In *Shaffer v. Heitner*, this Court held that "Fourteenth Amendment rights cannot depend on the classification of an action *in rem* or *in personam* since that is 'a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.'" 433 U.S. at 206 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950)). For the same reason, the application of tribal sovereign immunity cannot depend on a state court's classification of an action as *in rem* or *in personam*.

Finally, *County of Yakima* itself contains language leaving open the extent of the State's procedural and substantive rights to collect taxes on the Reservation. The Court, even while recognizing the State's authority to impose taxes on fee lands on the Reservation, acknowledged that legal immunities may prevent the State from doing so. Rejecting an analogy between its ruling and the "*Moe*-condemned 'checkerboard,'" the Court in *County of Yakima* stated that its ruling would actually reduce regulatory fracturing by allowing the county tax assessor to do on the Reservation what he or she did anywhere else in the county: Make "parcel-by-parcel determinations" of the status of potentially taxable lands on the Reservation, "to take account of immunities or exemptions enjoyed, for example, by

federally owned, state-owned, and church-owned lands." 502 U.S. at 265. *County of Yakima* thus recognized that immunities or exemptions may still apply to lands owned by sovereigns, thereby foreclosing the conclusion that state authority to tax tribally-owned fee land necessarily implies that the tribe can be sued over ownership of that land. Rather, the case recognizes that the power to tax does not include the power to override immunities held by the landowner. The lower court's reliance on *County of Yakima* to define the scope of tribal immunity is therefore wrong. And so are other state court cases that come to the same conclusion. *See Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 691-93; *Anderson*, 929 P.2d at 385-87; *Miccosukee Tribe of Indians*, 78 So.3d at 33-34.

As we show next, tribal sovereign immunity applies to *in rem* proceedings, just as it does to federal and state-owned property.

II. TRIBAL SOVEREIGN IMMUNITY APPLIES TO *IN REM* ACTIONS.

A. As This Court Held In *Idaho I*, State Sovereign Immunity Bars An Action That Seeks To Divest A State of Its Rights To Property, And That Ruling Also Applies Conversely To This Case.

Sovereign immunity bars actions against a sovereign and its property. The longstanding rule is that "there is no distinction between suits against the government directly, and suits against its property." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868).

That rule applies to actions brought by a tribe against a State, as demonstrated by *Idaho v. Coeur d'Alene Tribe of Idaho* (*Idaho I*), 521 U.S. 261 (1997). In that case, the Coeur d'Alene Tribe filed an action

against the State of Idaho, state agencies, and state officials, asserting that Idaho had no valid claim of title to the submerged lands under navigable waters within the exterior boundaries of the Coeur d'Alene Reservation, and seeking prospective relief to block the State from continuing to claim title. *Id.* at 264-65. The Court readily concluded that sovereign immunity barred the Tribe from pursuing the action against the State, relying on its holding in *Blatchford* that "[s]ince the plan of the Convention did not surrender Indian tribes' immunity for the benefit of the States, . . . the States likewise did not surrender their immunity for the benefit of the tribes." *Idaho I*, 521 U.S. at 268 (citing *Blatchford*, 501 U.S. at 779-82). Nor could the Tribe avoid the State's immunity by suing state officials in their individual capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because the case was "the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. Although the Court recognized that the Tribe had its own claim to the lands, and that on the merits the lands were "just as necessary, perhaps even more so, to its own dignity and ancient right" as they were to the State, *id.* at 287, the dispositive inquiry was the relationship between the lands and state sovereign immunity, *id.* Given that, if the Tribe were to prevail, "Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," *Young* could

not properly provide an exception to state sovereign immunity in that case. *Id.*[7]

Idaho I compels the same result for the Tribe here that it did for the State there. Under settled law, Indian tribes are immune from suits brought in state court by private parties. *Bay Mills*, 134 S. Ct. at 2031. And here, as in *Idaho I*, an alternative theory is relied on to circumvent that immunity and divest the sovereign of its interests in the property at issue. Furthermore, the instant action is not the "functional equivalent" of a quiet title action, as it was held to be just such an action by the court below, *Lundgren*, 389 P.3d at 572-73, and the decision below purports to divest the Tribe of any interest in the property, *id.* at 574-75 (concluding that the Tribe has no interest in the property). To divest a tribe of its interests in fee lands is to interfere directly with the tribe's sovereign interests in its governmental operations, its patrimony, and its "dignity and ancient right[s]" as a sovereign. That is so because tribes purchase fee lands for many purposes, including providing services to members both on- and off-reservation, engaging in economic enterprises that provide revenue for governmental operations, protecting cultural and archaeological resources, and

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[7] In a follow-up case brought by the United States against Idaho, *Idaho v. United States (Idaho II)*, 533 U.S. 262 (2001), the Court found on the merits that, under an exception to the equal footing doctrine, the submerged land had been reserved by the United States in trust for the Tribe, *id.* at 274-81. That finding was based on the Tribe's historical reliance on the waters for subsistence, transportation, recreation, and cultural activities, *id.* at 265 (citing *United States v. Idaho*, 95 F. Supp. 2d 1094, 1095-96, 1099-1100 (D. Idaho 1998), *aff'd*, 210 F.3d 1067 (9th Cir. 2000)), and their historical demands that the United States include those lands and waters in the Reservation for the Tribe's use, *id.* at 265-66, 275-76.

regaining aboriginal lands lost to cession and settlement. *See* Interest of *Amici*, *supra*. Accordingly, the principles that blocked a lawsuit that sought to circumvent state sovereign immunity in *Idaho I*, also protect tribes from a lawsuit that seeks to circumvent tribal sovereign immunity, based on a "novel distinction" without support in the law. *See Cayuga Indian Nation*, 761 F.3d at 221 (citing *Bay Mills*, 134 S. Ct. at 2031).

Furthermore, because this case deals with tribal immunity from suit in state courts, rather than a State's authority over another State's lands, the decision in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), has no application here, and the state courts that relied on it to conclude that tribal immunity does not apply to *in rem* proceedings erred (cited in *Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 693-94 (quoted in *Miccosukee Tribe of Indians*, 78 So.3d at 33-34)). In *City of Chattanooga*, the Court found that the City of Chattanooga, Tennessee, could condemn land in the City that was owned by the State of Georgia and used by a Georgia state-owned railroad company. 264 U.S. at 479-80. As this Court later made clear in *Nevada v. Hall*, 440 U.S. 410 (1979), States are not immune from suit in another State's courts, *id.* at 425,[8] which results

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[8] Although *Hall* was a tort case involving the conduct of a state employee, rulings since have clarified that it applies in any case where the exercise of a State's adjudicatory authority over another State would "pose[] no substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424 n.24. *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 497-98 (2003) (allowing suit in Nevada state court against California tax collecting agency for torts arising from agency's audit of former California resident living in Nevada); *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998) (*Hall* only limited by whether state court jurisdiction would not interfere with another state's

from the mutual consent to sue given by the States at the constitutional convention, *see Blatchford*, 501 U.S. at 779-82. So even if *City of Chattanooga* could be said to have had implications for one State's sovereign immunity in another State's courts at an earlier time, its ruling on that score has been superseded by *Hall*. In addition, distinctly different principles apply to Indian tribes, which as a matter of federal law are immune from suits brought in state court, including those arising from commercial activities on off-reservation lands, *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 758). And the Tribes did not surrender their immunity to the States in the plan of the Convention. *Blatchford*, 401 U.S. at 779-82. *City of Chattanooga* thus has no application to the federal law of tribal sovereign immunity.[9]

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sovereign responsibilities); *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 365-66 (Ala. 1992) (allowing contract and tort claims in Alabama court against Tennessee public university for conduct arising in Tennessee); *Struebin v. State*, 322 N.W.2d 84, 86 (Iowa 1982) (*Hall* limited by whether a State's "sovereign prerogatives and responsibilities" would be threatened, not by its facts; allowing suit in Iowa state court against Illinois for Illinois's alleged negligence in maintaining a road in Iowa pursuant to inter-state contract); *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 729 & n.2 (N.Y. 1980) (permitting contract claims in New York court against Texas public university for conduct arising in New York).

[9] As *City of Chattanooga* dealt with the State's power of eminent domain, it is inapplicable here for that reason as well. Here, private parties seek to sue a sovereign tribe to adjudicate title to land. This case does not implicate the special sovereign interests underlying the exercise of eminent domain, which justified Tennessee's authority over Georgia's land. 264 U.S. at 480 (describing eminent domain as "essential to the life of the state" and "extend[ing] to all property within the jurisdiction of the state"). The same is true of the other state cases that rely on

B. Decisions Of This Court Establishing That Federal And State Sovereign Immunity Apply To *In Rem* Proceedings, Direct The Same Result With Respect To Tribal Sovereign Immunity.

Applying tribal sovereign immunity to bar *in rem* actions brought in state court is also supported by a long line of decisions holding that sovereign immunity both protects the government from suit and protects "its possession from disturbance by virtue of judicial process." *The Davis*, 77 U.S. (10 Wall.) 15, 21 (1869). *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505 (1998) (citing *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 709-10 (1982) (White, J., concurring in judgment in part and dissenting in part)). If the effect of a lawsuit would be to deprive the government of its property, even if tl.e suit is not against the government directly, it is barred by sovereign immunity because it is "in substance and effect one against the [government] without its consent." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962).

This Court's consideration of claims to government property show that dispossession of the government's property is an affront to sovereign authority that, when sought by suit, is barred by sovereign immunity. *Id.*; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). In *Larson*, the Court

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City of Chattanooga to assert state jurisdiction over *in rem* actions against tribes. In both cases, a State sought to condemn land owned by a tribe for a public purpose. *Cass Cnty. Joint Water Res. Dist.*, 643 N.W.2d at 688; *Miccosukee Tribe of Indians*, 78 So.3d at 32. So, even if *Cass County Joint Water Resources District* and *Miccosukee Tribe* correctly relied on *City of Chattanooga* – and they did not – none of these decisions are within the ambit of this case.

resolved then-existing conflicts in the sovereign immunity case law by explaining why sovereign immunity protects government officials from suit over the disposition of the sovereign's property. *Malone*, 369 U.S. at 646 (citing *Larson*, 337 U.S. at 701). The *Larson* Court dismissed a suit against a federal officer in his individual capacity, in which the plaintiff sought to establish his ownership, under a government contract, of coal in the government's possession and to enjoin the officer to deliver the coal to him. 337 U.S. at 684. The Court dismissed the suit because the relief sought was "against the sovereign" since it sought to determine the plaintiff's rights in the coal vis-à-vis the government, *id.* at 689 n.9, and require the government to deliver that coal to the plaintiff, *id.* at 689. The Court held that such a suit cannot be maintained unless the government officer is acting outside his or her lawful, delegated authority or the plaintiff's constitutional rights have been violated.[10] *Id.* at 689-90. Even if either of those two exceptions apply, sovereign immunity may bar the suit if it "will require . . . the disposition of unquestionably sovereign property." *Id.* at 691 n.11 (citing *North Carolina v. Temple*, 134 U.S. 22, 26 (1890) (dismissing suit against state official for the disbursement of state funds)).

In *Malone*, the Court applied this rule to dismiss a suit in which the plaintiff sought to eject federal

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[10] This qualification explains the apparently contradictory conclusion in *United States v. Lee*, 106 U.S. 196, 210, 215-16, 219 (1882), that officers of the United States could be sued to recover property in the United States' possession. For, as *Larson* explains, the United States had obtained the land held there by an unconstitutional taking, and so *Lee* falls into the exception for suits to vindicate constitutional rights. 337 U.S. at 696-97 (citing *Lee*, 106 U.S. at 219).

officials from land the government had acquired by deed, based on the theory that the plaintiff was the lawful owner of the land. *Malone*, 369 U.S. at 643-44 & n.2, 648. The plaintiffs argued that the United States had purchased the property from third party sellers who did not actually hold legal title to the land at the time of purchase. *Id.* at 644 n.2. Because the plaintiffs did not allege any violations of the constitution or that the defendant officer had no statutory authority to occupy the land, their suit was dismissed. *Id.* at 648.

Larson and *Malone* show that the critical question in determining the applicability of a sovereign's immunity to an action is whether the sovereign is the real party in interest. That inquiry turns on whether the relief sought is effectively against the sovereign, because it seeks an adjudication of ownership of the government's money or property. *See Larson*, 337 U.S. at 688-89; *Malone*, 369 U.S. at 647-48; *Temple*, 134 U.S. at 26. This basic principle was reaffirmed in *Idaho I*, 521 U.S. at 269-70, 282-87, and this Court's decisions, as well as lower federal court decisions, show that it has broad application to *in rem* cases.

This Court recently applied the rule that a suit to adjudicate ownership of a sovereign's property is generally barred by sovereign immunity to admiralty proceedings in *Deep Sea*, 523 U.S. at 505-06. *Deep Sea* was an *in rem* case in which a salvor brought an action asserting ownership of a shipwreck in California's territorial waters. *Id.* at 495-96. California intervened and asserted ownership of the shipwreck under the Abandoned Shipwrecks Act, 43 U.S.C. §§ 2101-2106, which gives a State title to abandoned shipwrecks on, or embedded in, its submerged lands. 523 U.S. at 496. California moved to dismiss the salvor's

action on the basis of state sovereign immunity, arguing that it possessed title to the wreck under federal and state law and therefore the salvor's *in rem* action was actually against the State. *Id.* at 496-97. The Court ruled that the case should not be dismissed. It recognized the ancient rule that proceedings *in rem* against property held by a sovereign are forbidden "in cases where, in order to sustain the proceeding, the possession of the [sovereign] must be invaded under process of the court . . . ." *Id.* at 507 (quoting *The Davis*, 77 U.S. (10 Wall.) at 20). Under this rule as applied in the admiralty *in rem* context, courts lack jurisdiction over a proceeding against a sovereign's property when the sovereign can show "actual possession" of the *res*. *Id.* (citing *The Siren*, 74 U.S. (7 Wall.) at 159 (describing "exemption of the [federal] government from a direct proceeding *in rem* against the vessel whilst in its custody")); *The Pesaro*, 255 U.S. 216, 219 (1921) (applying same rule to foreign-owned vessel)). California failed to qualify for immunity because it had merely asserted a colorable claim to the shipwreck and had not established possession of the wreck as a matter of admiralty law. *Id.* at 498, 507.[11]

The lower courts have consistently interpreted *Deep Sea*, and the cases on which it relies, to bar *in rem* admiralty proceedings to adjudicate ownership of shipwrecks or other property in the sovereign's possession. For instance, in *Fairport International Exploration, Inc. v. Shipwrecked Vessel, Captain Lawrence*, 177 F.3d 491, 497-98 (6th Cir. 1999), the

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[11] As discussed in Petitioner's brief at 28 n.2, this manner of establishing possession in admiralty law does not apply in the real property context where a sovereign has established possession by obtaining title to the property, *see Malone*, 369 U.S. at 644, as the Petitioner did here by warranty deed, Pet.'s Br. at 5.

Sixth Circuit held that the State could not assert sovereign immunity in a case to adjudicate ownership of a shipwreck, because the shipwreck remained embedded in the lake bed during the proceedings and the State did no more than assert a colorable legal claim to it. And in *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330, 1335-37 (11th Cir. 2010), the Eleventh Circuit held that the State could not raise sovereign immunity against an *in rem* proceeding to determine ownership of submerged logs on lands under navigable waters because, although it patrolled the waters over the logs, located them with sonar, and purported to extend state law over the terms of their ownership, it never established physical possession of the logs. *See, e.g., Ne. Research, LLC v. One Shipwrecked Vessel*, 729 F.3d 197, 207 n.14 (2d Cir. 2013); *Great Lakes Exploration Grp., LLC v. Unidentified Wrecked & (For Salvage-Right Purposes), Abandoned Sailing Vessel*, 522 F.3d 682, 688 (6th Cir. 2008). The corollary to these holdings is that a sovereign has immunity from *in rem* admiralty proceedings against property that it possesses under admiralty law.

The rule that sovereign immunity applies to *in rem* proceedings has also been applied outside of the admiralty context. In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 446-47, 454 (2004), this Court held that States are not immune from proceedings in bankruptcy to discharge a student loan debt, owed by a private party to the State, *id.* at 446-47. In so holding, the Court analogized bankruptcy *in rem* proceedings to admiralty *in rem* proceedings, *id.*, and held that state sovereign immunity was not implicated because the proceeding was an *in rem* action where the Government was not in possession of property. *Id.* at 454-55. *See In re Ellett*, 254 F.3d 1135, 1141 (9th Cir.

2001) (comparing *Deep Sea*'s principles of admiralty *in rem* to bankruptcy *in rem*).

Additionally, Congress has recognized that the federal government's sovereign immunity must be waived in order for it to be bound by general stream adjudications of water rights, *see* 43 U.S.C. § 666 (waiving United States' immunity from general stream adjudications in state courts), which is necessary because water adjudications are "in the nature of" *in rem* proceedings, *Nevada*, 463 U.S. at 144; *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-14 (9th Cir. 1999); *see Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) ("actions seeking the allocation of water essentially involve the disposition of property").

These decisions establish that federal and state sovereigns are immune from *in rem* suits that seek possession of the sovereign's property, as much as if the suit was brought against the sovereign directly. And the common law principles on which they are based apply to tribal immunity as well, and bar the Respondents' suit.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
PETITIONER,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,
RESPONDENTS.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF ILLINOIS, INDIANA, NEW MEXICO, AND TEXAS IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether tribal sovereign immunity precludes a state court's assertion of *in rem* jurisdiction when the tribe has not waived its immunity and the state court has not deemed it an indispensable party.

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INTEREST OF *AMICI CURIAE*

This case presents the question whether the doctrine of tribal sovereign immunity precludes a state court from exercising *in rem* jurisdiction, specifically with respect to an action to quiet title to land claimed by both a tribe and a third party. This Court has long held as a general matter that when it comes to States' interests in property, the nature of an action—whether it is *in rem* or *in personam*—does not alter the sovereign immunity analysis, because both types of proceedings potentially determine the State's rights. The Amici States have a strong interest in maintaining that principle and submit this brief to support that narrow proposition.

States can be subject to a wide range of *in rem* suits, including quiet title actions, demands for easements, and attempts to sue them in interpleader actions and other collective proceedings to decide the rights of the State in a particular piece of property in which one or more other parties also assert ownership rights. If the mere fact that the adjudication seeks to decide such competing rights in property can force a sovereign to choose whether it must forfeit its rights or its immunity, the States will lose much of the value that such immunity affords them. Although the Amici States may have differing views on the wisdom of recognizing tribal immunity and its scope, and express no view as to the appropriate disposition of this case, they have a united interest in ensuring the continued vitality of state sovereign immunity as applied to *in rem* actions.

STATEMENT OF THE CASE

1. The Lundgrens own a piece of property adjoining property recently purchased by the Upper Skagit Indian Tribe (the "Tribe"). The Tribe bought the adjoining property in 2013 from a family that had owned the land for an extended period of time. The Lundgrens had treated 10 acres at the edge of Tribe's land as their property since 1947 and had erected a fence setting off their land. The record deed for the property bought by the Tribe, however, covered the 10-acre parcel the Lundgrens had included within their fence line. The Tribe did not learn of the fence until a survey was made at some point after the purchase. The Tribe then notified the Lundgrens that the fence did not mark the proper boundary and asserted ownership of the entire parcel described in the deed. The Lundgrens initiated a quiet title action in March 2015, seeking a state-law determination that they had acquired title to the 10 acres by adverse possession before the sale to the Tribe occurred.

2. The Tribe filed a motion to dismiss based both on its asserted tribal immunity and on the fact that it had not been named in the quiet title action even though it was a necessary and indispensable party. The trial court denied the motion to dismiss and, in a later ruling, granted summary judgment to the Lundgrens, finding that they had established ownership of the disputed land by adverse possession.

3. On appeal, the Washington Supreme Court held that tribal immunity did not apply because the quiet title action was an *in rem* proceeding and therefore did not require assertion of jurisdiction over the Tribe itself. Pet. App. 2a. It based that decision on its reading of *County of Yakima v. Confederated Tribes & Bands*

of Yakima Indian Nation, 502 U.S. 251 (1992), and two state-court decisions that purported to apply *Yakima* to quiet title actions brought against tribal entities. Pet. App. 8a–11a (citing *Anderson & Middleton Lumber Co. v. Quinalt Indian Nation*, 929 P.2d 379 (Wash. 1996); *Smale v. Noretep*, 208 P.3d 1180 (Wash. App. 2009)).

The court also held that the Tribe was not an indispensable party under Superior Court Rule 19, the state-law rule equivalent to Federal Rule of Civil Procedure 19. Pet. App. 11a–18a. In the course of resolving that issue, the court stated that because the Tribe resisted being brought into state court, and had not waived its immunity from suit in tribal court, it was using immunity not as a "shield" but as a "sword" to preclude the Lundgrens from finding any forum in which they could assert a right to property "they rightfully own." Pet. App. 11a, 18a.

4. Four justices dissented. They accepted the majority's conclusion that tribal immunity did not bar an *in rem* action to quiet title in the tribe's absence, Pet. App. 21a (Stephens, J., dissenting), although they noted that other courts disagreed and had held that tribal immunity bars state-court *in rem* actions, *see Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016), and *Cayuga Indian National v. Seneca County*, 761 F.3d 218 (2d Cir. 2014). In the dissent's view, though, tribal immunity remained relevant to the Rule 19 analysis. Under a proper analysis of that rule, the dissent argued, the Tribe's absence due to its immunity required dismissal of the action. Pet. App. 22a–24a. The dissent noted that a judgment entered in the Tribe's absence would cloud its record title even if it might not be bound by that judgment. And the dissent could not "imagine a remedy that would lessen

the prejudice that results from quieting title to disputed property in the absence of the record title holder." Pet. App. 34a. The dissent acknowledged that there appeared to be no other judicial forum to resolve the quiet title issues, but noted that inability to join an indispensable party for any reason—including based on that party's sovereign immunity—often has that consequence. Pet. App. 35a–36a.

5. The Tribe filed a petition for a writ of certiorari challenging the Washington Supreme Court's conclusion that the state court had authority to conduct an *in rem* proceeding to quiet title, notwithstanding the tribe's absence and its assertion of immunity. This Court granted the petition.

SUMMARY OF ARGUMENT

A sovereign has the inherent right to protect itself from being sued without its consent. While Congress has some authority to abrogate sovereign immunity with respect to the States—and greater power to do so with respect to tribes, *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998)—such immunity presumptively applies in any judicial proceeding that could adversely affect or determine rights asserted by the sovereign. In particular, when States seek to protect their interests in property, they may assert immunity whether the rights at issue are asserted in an *in personam* action that could result in the sovereign's liability or in an *in rem* action to determine the rights of parties in a particular piece of property.

Thus, this Court has long recognized that "[a]ll proceedings, like all rights, are really against persons," *Shaffer v. Heitner*, 433 U.S. 186, 207 n.22 (1977), and that "[t]he fiction that an assertion of jurisdiction over

property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification," *id.* at 212. Any attempt to treat an *in rem* action dealing with property claimed by a sovereign as something other than a suit *against* that sovereign is thus an impermissible attempt to perpetuate that fiction.

This Court has explicitly so found as to States in quiet title actions in federal court, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and in interpleader cases, *Cory v. White*, 457 U.S. 85 (1982). And this Court has used the same analysis and announced the same rule in cases affecting interests of the United States, including quiet title actions, *United States v. Brosnan*, 363 U.S. 237 (1960), and probate cases, *United States v. Shaw*, 309 U.S. 495 (1940). Regardless of the ultimate disposition of this case, the Amici States urge this Court to reaffirm its view that the *in rem* nature of an action concerning property held by a sovereign does not suffice to overcome that sovereign's ability to assert its immunity from suit.

ARGUMENT

I. Sovereign immunity applies to *in rem* actions, including actions to determine ownership of property held by a State.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," *The Federalist* No. 81, at 548 (Alexander Hamilton) (B. Cooke ed., 1961) (emphasis in original). As this Court has noted, "[i]mmunity from private suits has long been considered 'central to sovereign dignity.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

The States retained their immunity from suit by private entities when they entered the Union and may also waive it as they choose. The federal government may abrogate that immunity, but only to the extent authorized by the plan of the Constitutional Convention. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321–323 (1934) ("There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.") (internal quotation omitted). Absent such abrogation, their immunity remains intact. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Because sovereign immunity applies to actions brought against a sovereign, there was initially some doubt as to whether an *in rem* action—one brought to decide ownership of a piece of property—should be viewed as one being brought against the *parties* who disputed that issue, or only against the *property* itself. For a time, the argument was made that the ownership dispute could be decided on an abstract basis without the need to invoke jurisdiction over the parties involved in that dispute, at least where the parties sought a judgment that would bind all the world. As we show below, however, this analysis has long since been rejected by this Court.

A. *In rem* actions are proceedings against those who claim an interest in the subject property.

As long ago as *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Court declared that "in a larger and more general sense" *in rem* actions are "*actions between parties*

where the direct object is to reach and dispose of property owned by them, *or of some interest therein*." *Id.* at 734 (emphases added). That is true even though, "in a strict sense," an *in rem* action is "taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants." *Id.* And *Pennoyer* held that because the competing property owners' interests are affected by *in rem* proceedings, due process required that the disputed property's owner be made aware of the action—including by seizure of the property, which the law assumed to be in the possession of its owner or an agent—before the merits could be addressed. *Id.* at 726–28.

The Court revisited this issue in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950), where it sought to resolve confusion over whether personal service was required in *in rem* proceedings. The Court held that known beneficiaries of a trust are entitled to *personal* notice, not mere publication notice, of an *in rem* proceeding to determine whether a trustee had satisfied his duties to them and could be discharged from further liability. *Id.* at 318. Their personal interests in the assets at issue were sufficient to require that they be given due process before their rights were affected, no matter how the proceeding was classified. *Id.* at 312.

This line of cases culminated in *Shaffer*, which held that state courts' jurisdiction over *in rem* actions is subject to the same due process standard as *in personam* actions, namely, the minimum contacts test established in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In reaching that conclusion, the Court explained that "[t]he overwhelming majority of commentators have also rejected *Pennoyer's* premise

that a proceeding 'against' property is not a proceeding against the owners of that property." *Shaffer*, 433 U.S. at 205. Rather, "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court." *Id.* at 206. The Court explained that "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected.'" *Id.* at 206 n.22 (quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), *appeal dismissed*, 179 U.S. 405 (1900)).

Taken together, *Pennoyer*, *Mullane*, and *Shaffer* demonstrate that the invocation of *in rem* jurisdiction over real or personal property does not excuse a court from considering the real substance of a lawsuit. That reasoning dictates that the use of the *in rem* label here cannot be the end of the analysis in addressing whether the Washington state courts had the power they exercised to affect the Tribe's interests in real property.

B. This Court has long held that sovereign immunity applies to *in rem* actions seeking to adjudicate ownership of an asset in which the States or the United States claim an interest.

Because an *in rem* action determines the rights of parties, a sovereign's right to immunity from suit over its interests in property applies just as much to *in rem* actions as to *in personam* actions. If sovereign immunity would bar a court from deciding the rights of the sovereign in a dispute between it and a single party, it also bars a court from deciding those rights in an action with multiple parties, or in an *in rem* action that

seeks a judgment binding the whole world. Indeed, this Court has so stated on numerous occasions in cases brought against States and the United States.

This Court announced the general rule in *Missouri v. Fiske*, 290 U.S. 18 (1933), that the fact "that a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issue of process against a nonconsenting state." *Id.* at 28. Although a State may choose to appear before the Court, the court "has no authority to . . . compel [the State] to subject itself to the court's judgment, whatever the nature of the suit." *Id.*

And in the case most analogous to this one, *Coeur d'Alene Tribe*, all nine Justices—and the parties—agreed that an *in rem* quiet title action could not be brought against a State in federal court:

> It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it. *Tindal* [*v. Wesley*, 167 U.S. 204, 223 (1897)].

521 U.S. at 281-82; *see also id.* at 289 (O'Connor, J., concurring) ("The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."); *id.* at 307 (Souter, J., dissenting) ("settling the matter of title by compelling the State itself to appear in a federal-question suit is barred by Eleventh Amendment doctrine"). The only question in the case was whether the tribe's suit, which sought to exclude the State from exercising any regulatory control over submerged lands beneath Lake Coeur d'Alene and associated waterways, was the

functional equivalent of such a quiet title action. The majority found that it was, and accordingly held the action barred by the State's immunity. *Id.* at 287.

This Court has also held that States enjoy immunity from interpleader actions, another type of *in rem* proceeding. In *Cory v. White*, the Court held that the estate of Howard Hughes could not bring an interpleader action in federal district court to decide which of two competing States could lay claim to being Hughes's domicile at the time of his death and could therefore impose estate taxes on him. 457 U.S. at 91. Indeed, the Court held that the suit was barred even though it named the relevant state officials rather than the States themselves. *Id.* at 90–91. It then affirmed that the position first expressed in *Worcester County Trust Co. v. Riley*, 302 U.S. 282 (1937)—that an interpleader action to determine ownership of a disputed asset is barred by the State's sovereign immunity—remained good law. *Id.* at 91.[1]

This Court has also confirmed that quiet title actions may not be brought against the United States without its consent, *United States v. Brosnan*, 363 U.S. 237, 243 (1960) (explaining it is "well established that the United States was an indispensable party to any suit affecting property in which it had an interest, and that such a suit was therefore a suit against the United States which could not be maintained without its consent"), and has limited the relief that can be awarded against the United States when it files a claim in an *in rem* probate proceeding, *United States v. Shaw*, 309 U.S. 495 (1940).

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[1] The Court also reiterated that suit was barred by the States' immunity even if it sought only injunctive relief and not monetary damages. *Id.* at 90.

Moreover, in quiet title actions against a State or the United States, the sovereign does not bear the burden of proving its interest in the lands in order to assert its immunity from suit. As the Tenth Circuit observed, "[t]he very purpose of the [sovereign immunity] doctrine is to prevent a judicial examination of the merits of the government's position." *Iowa Tribe of Kansas and Nebraska v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010). When the United States acts to take land into trust for tribes, for instance, the Secretary of Interior "need only make a colorable claim that the land is held in trust on behalf of an Indian tribe." *Id.* at 1231. *See also Alaska v. Babbitt*, 75 F.3d 449, 451–52 (9th Cir. 1996) (quiet title action may not go forward in the face of a colorable claim of a federal property interest); *Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994) (same).

This Court's case law thus establishes that the States and the United States control their amenability to actions concerning their title to property. The mere fact that an action is *in personam* or *in rem* does not affect this ability to assert immunity from suit.[2]

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[2] Although the Court has interpreted state sovereign immunity more narrowly for *in rem* actions in admiralty, *see California v. Deep Sea Research*, 523 U.S. 491 (1998) (Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty action in which State does not have direct possession of *res*), and bankruptcy, *see Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), those decisions reflect unique features of maritime and bankruptcy law. *See, e.g.*, *Deep Sea Research*, 523 U.S. at 506 (reaffirming general rule that "the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests"); *Katz*, 546 U.S. at 377–78 (concluding that States agreed in plan of convention to abrogation of sovereign immunity against proceedings necessary to effectuate *in rem* bankruptcy jurisdiction). There may likewise be reasons rooted in

County of Yakima is not to the contrary. There, the Court considered whether the County of Yakima could impose an ad valorem property tax or excise tax on the sale of fee-patented land located within the Yakima Tribe reservation. The tribe argued that federal law barred the imposition of the taxes on those parcels, relying on *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), which held that a State could not impose its cigarette taxing regime generally across an entire reservation without regard to the ownership of the land. The Court rejected this argument, stating that "because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned and it is not impracticable either." *County of Yakima*, 502 U.S. at 265. The Court explained that the "parcel-by-parcel determinations that the State's tax assessor is required to make on the reservation do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state-owned, and church-owned lands." *Ibid.*

The Court's reference to *in rem* jurisdiction in *County of Yakima* was simply a shorthand way of saying that the challenged tax related to a tangible, fixed piece of land and was a cost directly tied to that land—in other words, it was a reference to the State's substantive regulatory jurisdiction. Nothing in *County of Yakima* deals with sovereign immunity from suit, let alone supports the conclusion that the scope of such

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unique features of Indian law to reject the claim of immunity here. As with the admiralty and bankruptcy cases, however, any such conclusion should not undermine the general principle that sovereign immunity is available as a defense to actions affecting a State's property interests, regardless of whether the lawsuit is styled *in rem*.

immunity from suit is restricted when a lawsuit is *in rem* as opposed to *in personam*.

CONCLUSION

There may be unique features of tribal immunity that call for a narrow application of that doctrine here. The Amici States take no position on that question, or on the proper disposition of this case. The Amici States do, however, forcefully urge this Court to adhere to its settled view that characterizing a proceeding as *in rem* cannot suffice to eliminate a sovereign's ability to assert its inherent immunity from actions affecting its property interests without its consent.

Respectfully submitted,

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No. 17-387

In The Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PUEBLO OF LAGUNA, PUEBLO OF SAN FELIPE, ET AL., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

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Upper Skagit Tribal Council, *A Petition to the U.S. Secretary of the Interior to Proclaim an Upper Skagit Reservation* (Feb. 18, 1981) 32, 33

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests. Since 1944, NCAI has worked to protect the rights of Indian tribes and to improve the welfare of American Indians. To that end, it has advised federal, state and tribal governments on a range of issues, including tribal sovereign immunity.

NCAI represents more than 250 Indian tribes and Alaska Native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies and histories. In recent years, NCAI member tribes have defended numerous lawsuits seeking to seize tribal property, both real and personal. *See Wisconsin Dep't of Natural Res. v. Timber and Wood Prod. in Sawyer Cnty.*, No. 2017AP181, 2017 WL 6502934 (Wis. Ct. App. Dec. 19, 2017) (dismissing *in rem* action seeking to cut down and remove standing timber on tribally owned fee lands located within the reservation of the Lac Courte Oreilles Band of Lake Superior Chippewa); *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016) (dismissing lawsuit seeking to establish the validity of an easement across tribally owned fee land); *Armijo v. Pueblo of Laguna*, 247 P.3d 1119 (N.M. Ct. App. 2010) (dismissing quiet title claim

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

against Pueblo based on alleged prior adverse possession).

The Association on American Indian Affairs ("AAIA") is a 95-year-old advocacy organization founded to protect all aspects of tribal sovereignty that sustain tribal cultures.

NCAI, AAIA, and the individual amici Indian tribes have a strong interest in preserving time-honored principles of Indian law, preventing the emergence of new threats to tribal land, and averting the drastic curtailment of tribal sovereign immunity that the Respondents and the Washington courts have advocated in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Upper Skagit Indian Tribe ("Tribe") is a federally recognized tribe in Washington State. In the Treaty of Point Elliott, 12 Stat. 927 (1855), the Tribe ceded a large section of land in northwestern Washington to the United States. *Washington v. Wash. State Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661 n.1 (1979). Other than the Tribal cemetery acquired through a congressional appropriation in 1913, *see* 38 Stat. 77, 101 (1913), the Tribe was landless for more than 100 years. In 1976, the American Indian Policy Review Commission noted that "[b]ecause they lack a landbase from which to operate, [Tribal members] are severely impaired in their ability to develop a [T]ribal

economy." Final Report to the American Indian Policy Review Commission: Report on Terminated and Non-Federally Recognized Indians 182 (1976) (hereinafter "AIPRC Report").

It was not until 1981 that the Secretary of the Interior proclaimed approximately 74-acres of noncontiguous land to be the Tribe's initial reservation. Upper Skagit, Wash., Establishment of Reservation, 46 Fed. Reg. 46,681 (Sept. 21, 1981). More recently, the Tribe has acquired fee parcels on the open market in an attempt to rebuild a small land base. Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* 98-99 (2001). As part of these land recovery efforts, in 2013, the Upper Skagit Indian Tribe purchased a 39.56-acre parcel of undeveloped land in Skagit County from the title holders of record. *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 571 (Wash. 2017). This parcel is located in the Tribe's aboriginal territory, adjacent to lands that the United States already holds in trust for the Tribe's benefit. *Upper Skagit Indian Tribe v. Lundgren*, Appellant's Opening Brief, 2015 WL 10438675, at *2 (Oct. 2, 2015). One of those adjacent trust parcels is the site of a Tribal cemetery. *Id.*

More than one year after the Tribe purchased this property, the Respondent Lundgrens brought a quiet title action, claiming to have adversely possessed the southern portion of the parcel. Respondents have not developed or cultivated this land; their only claim to adverse possession is based on the location of an overgrown barbed-wire fence, and an assertion that they

removed fallen or dead trees from the area. *Lundgren*, 389 P.3d at 571.[2]

If the United States, instead of the Tribe, had purchased the fee land in question, this lawsuit presumably would have been dismissed by Washington courts. Over the past 60 years,[3] this Court has repeatedly stated that federal sovereign immunity cannot be evaded by sleights of hand such as naming a governmental official, or bringing an *in rem* action against government property. *E.g.*, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280-86 (1983) (dismissing North Dakota's suit seeking to quiet title to federal lands that supposedly passed into state ownership pursuant to the equal footing doctrine); *Malone*, 369 U.S. at 643-45 (holding that sovereign immunity barred an action for ejectment against a U.S. Forest Service official, where private plaintiffs claimed they

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[2] It is curious that the Washington Supreme Court highlighted the trial judge's statement that "this is as clear as a case [of adverse possession] as I've had on the bench." *Lundgren*, 389 P.3d at 572. In many jurisdictions, the facts in this case would not be sufficient to establish adverse possession. *See, e.g.*, *First Congregational Church of Enosburg v. Manley*, 946 A.2d 830, 835-37 (Vt. 2008) (mowing grass, parking cars, and constructing a wire fence used to contain animals was insufficient use to establish adverse possession); *Lake v. Severson*, 993 P.2d 309, 310-12 (Wyo. 1999) (pasturing livestock and occasional mowing is not enough to place property owner on notice of adverse use, and fence erected on property was a "convenience fence" not a "boundary fence" and therefore was insufficient to support adverse possession claim).

[3] "[I]t is fair to say that to reconcile completely all the decisions of the Court in this field [of sovereign immunity] prior to 1949 would be a Procrustean task." *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

were the rightful owners of land purchased by the United States). If the government is the real party in interest, the suit is barred regardless of the named defendant, unless a clear and unequivocal waiver has been granted.[4] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949).

Congress may pass legislation that waives the sovereign immunity of the United States. But despite all of the resources (both money and land) it has at its disposal, even the United States has not seen fit to authorize suits such as that filed by the Lundgrens. The only adverse possession claims that can be asserted against the federal government are based on color of title (i.e., a defective deed, relied upon in good faith by the person claiming ownership through adverse possession), and even then, such suits are severely restricted. *See, e.g.*, Quiet Title Act, 28 U.S.C. § 2409a(n) ("Nothing in this section shall be construed to permit suits against the United States based on adverse possession"); Color of Title Act, 43 U.S.C. § 1068 (providing that when a tract of public land has "been held in good faith and . . . under claim or color of title for more than twenty years," and the land has (1) either been cultivated or improved, or (2) taxes have been paid on the property, then the claimant can purchase the land from

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[4] A government official may be sued directly over a dispute involving federal property only if the lawsuit alleges the official's actions are unconstitutional or exceeded his statutory authority. *Block*, 461 U.S. at 281; *Malone*, 369 U.S. at 646-48. These exceptions are inapplicable here, as Respondents neither named a tribal official as a defendant, nor alleged that any tribal official had violated federal law.

the United States for its appraised value). Here, the Lundgrens apparently adversely possessed in bad faith (i.e., with knowledge that they did not own the land in question),[5] and therefore, they would not be able to bring a quiet title action against the United States if it were the property holder.

The result should be no different for the Upper Skagit Indian Tribe. Like federal and state immunity, tribal sovereign immunity is a creature of common law. It is derived from the inherent sovereignty of Indian tribes, which predates the U.S. Constitution. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978). In the past, this Court has always concluded that the scope of tribal sovereign immunity is coextensive with the scope of federal and state immunity. Consequently, tribal sovereign immunity precludes an action where the tribe is the real party in interest, such as where a lawsuit seeks to divest it of ownership of real property. *See, e.g.*, *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) (concluding that "[t]here is no reason to depart from these general rules [of state and federal sovereign immunity] in the context of tribal sovereign immunity" and noting that regardless of the named defendant, the

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[5] The Lundgrens' deed does not contain an incorrect description of the land, and they did not pay taxes on the disputed property. When approached by the Tribe, instead of claiming that the land was theirs, the Lundgrens immediately asked if the Tribe would be willing to trade or sell the land to them. The Lundgrens only claimed to have adversely possessed the property later, after the Tribe refused to sell or trade the disputed section. Declaration of Robert Hayden, ¶¶ 7, 12.

real question was whether the lawsuit would "require action by the sovereign *or disturb the sovereign's property*") (emphasis added). The only exceptions to this rule are where Congress has unequivocally abrogated tribal immunity, or where the tribe itself has granted a clear and express waiver. *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Neither abrogation nor waiver is alleged here.

This Court should not carve out a new exception to tribal sovereign immunity for quiet title actions or other *in rem* proceedings. One of the main purposes of sovereign immunity is to safeguard government property. That purpose has even greater force for Indian tribes, which have far fewer resources than state and federal governments, and which already have been dispossessed of much of their land and resources. *See Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (upholding tribal sovereign immunity while recognizing that the Choctaw Nation "would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to [bring] against it"); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 629 (2010) (noting that "[t]he fragile finances of many tribes . . . give [protection of the public money] added force in the tribal context. One large judgment [can] threaten a tribe's existence"); *see also* Section IV *infra* (discussing land dispossession). Furthermore, settled precedent recognizes that Congress is the branch of government

entrusted with authority over Indian affairs, and therefore, Congress is the appropriate body to accommodate the competing policy and reliance concerns. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014). Congress routinely considers issues involving tribal sovereign immunity, yet it has chosen not to abrogate such immunity here. *See* Section III *infra*. For these reasons, the Washington Supreme Court's decision should be reversed.

ARGUMENT

I. FEDERAL, STATE, AND TRIBAL SOVEREIGN IMMUNITY ARE ROOTED IN COMMON LAW AND SIMILAR IN SCOPE.

"When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent." *Alden v. Maine*, 527 U.S. 706, 715 (1999). But it was not just English common law that recognized as settled the doctrine that the King could not be sued. Rather, "the whole civilized world concurred" in the principle that a sovereign could not be subject to suit without its consent, even for activities occurring outside of his territory. *The Schooner Exchange v. McFadden*, 11 U.S. 116, 137 (1812).

"The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715. *See also Schooner Exchange*, 11 U.S. at 137-38 (subjecting a foreign sovereign to suit would be "incompatible

with his dignity, and the dignity of his nation"). This initial understanding was expressed by Alexander Hamilton in The Federalist No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind." James Madison and John Marshall assured states during the ratification process that this sovereign immunity would not be abrogated by the Constitution. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934). *See also Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 483 (1987) (collecting sovereign immunity cases where the Court has relied on the statements of Hamilton, Madison and Marshall).

American courts treated governmental immunity from court processes as received law. In early decisions, this Court thought the doctrine so basic that little explanation needed to be given for its origins or scope. For example, in *United States v. McLemore*, 415 U.S. 286 (1846), the Court held, without citation to any authority, that "the government is not liable to be sued, except with its own consent, given by law." *Id.* at 288. Four years later, this Court again announced, "[n]o maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign . . . cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends." *Hill v. United States*, 50 U.S. 386, 389 (1850).

McLemore and *Hill* were about federal sovereign immunity. But similarly, the first time the Court relied on state sovereign immunity, it found it unnecessary to identify any authority for the doctrine. The Court simply noted that "[t]he general proposition [is] that a sovereign independent State is not suable, except by its own consent. This general proposition will not be controverted."[6] *Cohens v. Virginia*, 19 U.S. 264, 380 (1821). Decades later, in *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court concluded that the doctrine of state sovereign immunity was so thoroughly entrenched in the legal system that it was not necessary to examine the "reason or expediency" behind it. *Id.* at 21. State sovereign immunity was not to be limited by the courts; any exceptions to the doctrine could only come from the state legislature. *Id.* at 21.

As these cases make clear, immunity from suit for federal and state governments is an underlying legal assumption – a recognition that it is a fundamental, inherent aspect of sovereignty. This immunity was acknowledged in English law and the law of nations, and it was ensconced in the common law; its source is

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[6] In *Chisholm v. Georgia*, 2 U.S. 419 (1793), a divided Court concluded that the Constitution's grant of jurisdiction over controversies between a "State and a citizen of another State" permitted such citizens to sue states in federal court. Reaction to this decision was swift. The Eleventh Amendment was ratified, and the Court in *Cohens* held that states could not be sued in federal court absent consent or waiver. Importantly, the Eleventh Amendment was designed to overrule the Court's decision in *Chisholm* and "restore the original constitutional design." *Alden*, 527 U.S. at 722.

not the U.S. Constitution. *Alden*, 527 U.S. at 713 ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, . . . the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.").

Tribal immunity from suit shares the same origins as federal and state immunity. From the very beginning of this country, Indian tribes were viewed as sovereign "states" or "nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Although Congress has power to alter tribal sovereignty, "unless and until Congress withdraws" a sovereign power, "the Indian community retains that authority in its earliest form." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016). Among the "core aspects of sovereignty that tribes possess" is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills*, 134 S. Ct. at 2030.

Tribal sovereign immunity, vis-à-vis the states, was not altered by the adoption of the U.S. Constitution. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties") (internal citations omitted). Additionally, it is not subject to diminution by the States. *Bay Mills*, 134 S. Ct. at 2031. But because tribal sovereignty is subject

to the control of the United States, Congress is "at liberty to dispense with . . . tribal immunity or to limit it." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). For Congress to abrogate tribal immunity, however, it must make its intention to do so unequivocally clear. *C & L Enters.*, 532 U.S. at 418. And while tribes can waive their own immunity, courts require that such waivers be clear and explicit. *Id.*

This Court has upheld tribal sovereign immunity for "well over a century." *Bay Mills*, 134 S. Ct. at 2040 (Sotomayor, J., concurring). The issue of tribal sovereign immunity first arose in this Court in *Parks v. Ross*, 52 U.S. 362 (1851). In that case, George Parks sued John Ross, Principal Chief of the Cherokee Nation, for debts allegedly incurred when the Cherokee were forcibly removed along the "Trail of Tears" from the southeastern United States to what is today the State of Oklahoma. *Id.* at 373-74. This Court held that Ross had acted as an officer of the Cherokee Nation, which precluded personal liability against him. *Id.* at 374.

In so holding, this Court invoked principles traditionally used to describe federal and state sovereign immunity, including establishing that the lawsuit was prohibited because the tribe was the real party in interest. *Id.* at 374 (noting that "the contract . . . was with the Cherokee nation," "[t]he money in [Ross'] possession was the money of the nation," and Ross had acted "within the scope of his authority"). The Court described the Cherokee as "a foreign and independent nation" and agreed that they were "governed by their

own laws and officers." *Id.* Since Congress had not given the Court any power to compel tribal officials to pay the debts of their nation (i.e., waived immunity), the suit could not succeed. *Id.*

In the years since *Parks*, this Court has said that the existence of tribal sovereign immunity is "settled law." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). It includes all tribal activities, whether on-reservation or off-reservation, and regardless of whether the activity is governmental or commercial in nature. *Id.* at 757 (finding tribe immune from suit on a contract to buy stock executed outside of reservation boundaries). It protects a tribe from suits seeking declaratory or injunctive relief as well as money damages, *id.* at 760, *Santa Clara Pueblo*, 436 U.S. at 58-59, and from counterclaims, *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). In short, the scope of tribal immunity is the same as federal and state sovereign immunity. *See, e.g., id.* at 512-13 (analogizing sovereign immunity of federal government to immunity of Indian tribes); *Lewis*, 137 S. Ct. at 1292 ("[t]here is no reason to depart from these general rules [of federal and state sovereign immunity] in the context of tribal sovereign immunity"); *Thebo*, 66 F. at 376 (Indian tribes "have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution"). *See also C & L Enters.*, 532 U.S. at 421 n.3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns.").

II. THERE IS NO *IN REM* EXCEPTION TO SOVEREIGN IMMUNITY.

A. This Court Has Consistently Barred Actions Targeting Government Property.

Sovereign immunity bars not only lawsuits that name the sovereign, but all lawsuits where the government is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). In deciding whether a case is barred by sovereign immunity, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S. Ct. at 1291. Consequently, a litigant cannot evade sovereign immunity by simply naming governmental officials as defendants if he seeks to compel government action, seize government property, or obtain money from the government coffers. *Larson*, 337 U.S. at 688 (barring suit seeking an injunction prohibiting the head of the War Assets Administration from delivering coal to anyone other than the plaintiff, because the suit was "in substance, a suit against the Government"); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (dismissing lawsuit against governmental official because the "relief sought nominally against an officer is in fact against the sovereign" because, among other things, it would "cause . . . the disposition of property admittedly belonging to the United States").

Likewise, a litigant cannot avoid sovereign immunity by bringing an *in rem* proceeding where the *res*

is owned by a government. As early as 1868, this Court acknowledged that "there is no distinction between suits against the government directly, and suits against its property." *The Siren*, 74 U.S. 152, 154 (1868). *The Siren* involved a collision between ships at sea, which would normally result in an *in rem* admiralty[7] proceeding against the ship itself. But this Court held that sovereign immunity barred the suit because the United States claimed ownership of the vessel. *Id.* at 155 ("This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.").

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[7] Admiralty jurisdiction is a constitutionally distinct area, and admiralty cases involve personal, not real property. As a result, this Court has recognized a limited exception in admiralty cases by requiring the property to be within the possession of the government for sovereign immunity to bar an *in rem* suit. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504 (1998) (holding that court could resolve admiralty claims regarding an abandoned shipwreck, because the property in dispute was never in possession of the state). This exception has not, and should not, be applied outside of these narrow confines of admiralty jurisdiction. While possession may sometimes be considered the best evidence of a colorable claim to ownership over personal property, in the context of real property, the presence of a recording system for land titles is far more reliable.

In the 150-years since *The Siren*, it has become well-settled law that *in rem* proceedings over property owned by federal, state, or tribal governments are barred by sovereign immunity. For example, *In re New York (II)*, 256 U.S. 503 (1921), involved claims against The Queen City, a steam tug owned by the State of New York, which was allegedly responsible for the drowning death of an individual. This Court dismissed the lawsuit against the tug, reasoning:

> [I]t is uniformly held in this country that even in the case of municipal corporations . . . their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. As Mr. Chief Justice Waite said, speaking for this court in *Klein v. New Orleans*, 99 U.S. 149, 150, 25 L. Ed. 430:
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> > 'To permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.'
>
> . . . .
>
> The principle . . . applies with even greater force to exempt public property of a state used and employed for public and governmental purposes.

In re New York (II), 256 U.S. at 511.

This Court also has repeatedly noted sovereign immunity prevents the enforcement of liens against

government-owned property absent a waiver. *United States v. Alabama*, 313 U.S. 274, 281 (1941). For example, in *Maricopa County v. Valley Bank of Phoenix*, 318 U.S. 357 (1943), state taxing authorities were precluded from foreclosing on a lien existing on federally owned land without a waiver of sovereign immunity. This Court stated that "even a proceeding against property in which the United States has an interest is a suit against the United States" that could not be maintained without its consent. *Id.* at 362.

More recently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Coeur d'Alene Tribe sought a declaration that it owned the beneficial interest in submerged lands of navigable waters on its reservation, and an injunction preventing Idaho from taking action in violation of its rights. *Id.* at 265. This Court dismissed the suit, holding that it was the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. Although there was sharp disagreement as to whether it truly was equivalent, the Justices and parties all agreed "that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent." *See id.* (calling this proposition "common ground between the parties"); *id.* at 289 (O'Connor, J., concurring) ("A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."); *id.* at 305 (Souter, J., dissenting) (noting that the Court had never permitted suits "ultimately quieting title . . . or limiting the affected government in any subsequent quiet title action"). *See*

also United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (rejecting "respondent's . . . argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity"); *Malone*, 369 U.S. at 646 ("suits against government agents, specifically affecting property in which the United States claimed an interest, [are] barred by the doctrine of sovereign immunity").

With respect to adverse possession, the protection of sovereign immunity has a particularly longstanding common law pedigree. Adverse possession violates the ancient maxim "*nullum tempus occurrit regi*," time does not run against the king. *See BP America Production v. Burton*, 549 U.S. 84, 96 (2006). William Blackstone himself recognized *nullum tempus* as an aspect of sovereign immunity, noting that "the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects." William Blackstone, *Commentaries on the Law of England* 247 (Tucker ed. 1803). This rule was incorporated into the American common law, *Block*, 461 U.S. at 294 (O'Connor, J., dissenting), and became a foundation for the general rule prohibiting adverse possession against the state. *See State v. Lombardo Bros. Mason Contractors*, 54 A.3d 1005, 1019 n.23 (Conn. 2012).

Although some states today have waived their immunity from adverse possession suits by statute, the majority do not. Paula R. Latovick, *Adverse Possession against the States: The Hornbooks Have it Wrong*, 29 Mich. J. L. Ref. 939, 945 (1996). Washington State, for example, prohibits adverse possession claims against

itself. Rev. Code Wash. § 7.28.090 (statutes creating claims to adverse possession under color of title and payment of taxes "shall not extend to lands or tenements owned by the United States or this state"); Rev. Code Wash. § 4.16.160 ("[N]o claim of right predicated upon the lapse of time shall ever be asserted against the state.").[8] Similarly, as discussed in the next section, the United States has refused to waive its immunity from adverse possession suits against its own property. *See* 28 U.S.C. § 2409a(n); 43 U.S.C. § 1068.

The reason the common law prohibits suits against sovereign land is clear. Seizure of any property in the hands of the sovereign violates its dignity and seizure of its land is an even greater violation. Ownership of land is core to a sovereign's service to the public. It is a crucial part of the governmental ability to protect its economy and culture. Our great public universities, railroads, highways, state and national parks, and military bases are all fruits of government land ownership. Allowing private litigants to threaten such land is no different from allowing them to threaten the sovereign itself.

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[8] *Gorman v. City of Woodinville*, 283 P.3d 1082 (Wash. 2012), held that the lapse of time prohibition did not apply to city property where the statute of limitations allegedly elapsed before the city acquired the property, but this was an interpretation of a state statute that does not affect this Court's determination of common law sovereign immunity.

B. Congress Has Legislated Based On The Understanding That Sovereign Immunity Protects Government Property.

The Judiciary is not alone in concluding that actions directed against government property are barred by sovereign immunity. Congressional statutes and hearings have long demonstrated that the Legislative Branch holds a similar view of the scope of sovereign immunity.

For example, in 1964, Congress passed legislation to establish the Public Land Law Review Commission. Pub. L. No. 88-606, 78 Stat. 982 (1964). The Commission was charged with making a comprehensive review of laws, policies and practices relating to public lands, and to recommend any necessary changes. *Id.* at § 4, 78 Stat. at 983. After five years of study, the Commission submitted a book-length report to Congress. *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (1970). Chapter 17 of that report, entitled "Trespass and Disputed Title," detailed that in disputes between the federal government and private citizens:

> Unless . . . the Government chooses to initiate litigation, it is virtually impossible for a private claimant to obtain a judicial resolution of title to lands which are claimed by the Federal Government. In any action brought against the Government to quiet title, i.e., to establish who the owner is, the Government has

> available to it the defense of sovereign immunity which it invariably asserts.

Id. at 261. The Commission recommended that Congress waive the federal government's sovereign immunity to enable quiet title actions to be brought against federal property, and it specifically recommended that this waiver include good faith claims based on adverse possession. *Id.*

Bills were quickly introduced in the Senate to implement many of the Commission's proposed changes, including the ones relating to disputed land titles. Senate Bill 579 would have allowed adverse possession claims against the United States if the land was occupied for not less than 20 years "by a person reasonably believing that he held title to such lands." *Hearing Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, on S. 216, S. 579, and S. 721*, 92nd Cong., 1st Sess. at 4 (Sept. 30, 1971) (hereinafter *Sept. 30, 1971 Hearings*). Senate Bill 216 was drafted to allow *any* quiet title action to be brought against the United States. *Id.* at 1.

During hearings on these bills, the Departments of Justice, Interior, and Agriculture were unified in their opposition to Senate Bill 579. *Id.* at 2-5 (collecting formal agency letters). As one Department of Justice official testified, because of "the doctrine of sovereign immunity," adverse possession "has never been applicable to lands owned by the Federal Government," and without such protection the government would incur

considerable expense lest adverse possession "lead to the unjust enrichment of individuals at the expense of people of the United States." *Id.* at 21-22; *see id.* at 31-32 (Department of Agriculture official testifying to same). And these same agencies also opposed the broad wording of Senate Bill 216, instead advocating for a version drafted by the Department of Justice. Among other things, the Department of Justice's draft bill explicitly stated that adverse possession claims would not be permitted against the United States, excluded quiet title actions against lands that the United States held in trust for Indian tribes, provided a strict statute of limitations for all actions, and left discretion in the United States to determine whether, if an adverse judgment was entered against it, the government would return the property to the claimant or simply pay just compensation. *Id.* at 2-5, 21.

While Senate Bill 579 was not passed by Congress, Senate Bill 216, as modified by the Department of Justice's proposal, was adopted by Congress in 1972. It is known today as the Quiet Title Act.

Throughout the debate on the Quiet Title Act, Congress repeatedly stated that the Act was necessary because without a waiver of sovereign immunity litigants were prevented from establishing ownership of lands claimed by the government. *See, e.g., Sept. 30, 1971 Hearings* at 8 (Senator Church, who co-sponsored S. 216 and S. 579, noted that "[b]ecause of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent"); *id.* at 20 (Assistant Attorney

General Shiro Kashiwa stating that "[u]nder existing law, the defense of sovereign immunity is a complete bar to action by a private litigant against the United States to adjudicate title to real property"). This justification was clearly expressed in both the House and Senate Reports. S. Rep. No. 92-575, 92nd Cong., 1st Sess. at 1-2 (1971) ("Because of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent."); H.R. Rep. No. 92-1559, at 6 (1972) (same). When Congress waived this immunity with the Quiet Title Act, it did so only after carving out the important exceptions requested by federal agencies. Adverse possession claims would not be allowed. 28 U.S.C. § 2409a(n). Indian trust or restricted lands would not be affected. 28 U.S.C. § 2409a(a). And the United States could choose whether to return the land or simply provide compensation if the claimant was successful. 28 U.S.C. § 2409a(b).

This legislative history demonstrates that Congress understands that sovereign immunity protects governments from quiet title actions and that without a waiver, such litigants may have no remedy. It also demonstrates that when Congress has granted waivers for the federal government's immunity, it has not seen fit to do so for adverse possessors without color of title,[9] it has protected Indian lands, and it has not

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[9] As noted at 5-6, *supra*, Congress has waived sovereign immunity for only a narrow category of adverse possession claims: litigants with color of title. And even then, there are many barriers to recovery. *See, e.g.*, 43 U.S.C. § 1068 (requiring both

permitted successful litigants to force the United States to relinquish the property in question.

III. CONGRESS IS THE APPROPRIATE BODY TO WEIGH COMPETING POLICY INTERESTS.

In the past, this Court has questioned "the wisdom of perpetuating the doctrine [of tribal sovereign immunity]." *Kiowa*, 523 U.S. at 758. Its most recent decision on the subject, however, does not evidence a similar skepticism about the doctrine's usefulness or vitality. *Bay Mills*, 134 S. Ct. at 2030-32, 2036-37. And even when skeptical, this Court has rightly refrained from carving out exceptions to tribal sovereign immunity. It has done so out of recognition that the Constitution vests the power to abrogate or diminish tribal sovereignty – including sovereign immunity – in the political branches of the federal government. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) (through the Treaty Clause and the Indian Commerce Clause "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes"). The Court has therefore repeatedly recognized that "it is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*,

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combination of good faith and valuable improvements or cultivation, or possession prior to 1901 and payment of taxes). In other statutes, such as the Public Land Sale Act, Pub. L. No. 90-516, 82 Stat. 870 (1968), Congress allowed federal property that had been subject to "unintentional trespass" to be sold if the land was not otherwise needed, but this law was only in effect for three years.

134 S. Ct. at 2037; *see Kiowa*, 523 U.S. at 758 ("[W]e defer to the role Congress may wish to exercise in this important judgment."); *Potawatomi*, 498 U.S. at 510 (because "Congress has consistently reiterated its approval of the immunity doctrine . . . we are not disposed to modify the long-established principle of tribal sovereign immunity").

There is no reason to change that bedrock conclusion now. Doing so would disrupt substantial reliance interests and would violate the doctrine of *stare decisis*. *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (*stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," and therefore, even in constitutional cases, the court has "always required a departure from precedent to be supported by some special justification"); *United States v. Maine*, 420 U.S. 515, 527-28 & n.9 (1975) (*stare decisis* has "particular force" in situations where entities have engaged in economic activity based on the Court's prior decisions). This Court recognized this very fact, only four short years ago. *Bay Mills*, 134 S. Ct. at 2036 (discussing the "special force" of *stare decisis* in tribal sovereign immunity).

Congress has carefully exercised its authority to revise the scope of tribal sovereign immunity for more than 100 years. As early as 1909, for example, Congress expressly authorized specific suits against six Indian tribes. Act of May 29, 1908, ch. 216, § 2, 35 Stat. 444, 444-45 (Menominee); *id.* at § 5, 35 Stat. at 445

(Choctaw); *id.* at § 16, 35 Stat. at 451 (Choctaw and Chickasaw); *id.* at § 26, 35 Stat. at 457 (Creek);[10] *id.* at § 27, 35 Stat. at 457 (Mississippi Choctaw).

As this Court has already recognized, in the years following *Kiowa*, Congress continued to exercise its power over Indian affairs by enacting legislation that either preserved or abrogated tribal sovereign immunity. *Bay Mills*, 134 S. Ct. at 2038 (collecting statutes). Some of these statutes addressed specific tribes or narrow factual circumstances. *E.g.*, Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(a)(1), 117 Stat. 782, 795 (2003) (waiving both the United States' and the Tribe's immunity from suit for certain non-monetary claims under the settlement agreement). But Congress also considered and rejected broad abrogations of immunity that would have paralleled abrogations granted by the United States in the Tucker Act and the Federal Tort Claims Act. *Bay Mills*, 134 S. Ct. at 2038 (citing S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998)).

After this Court's 2013 decision in *Bay Mills*, Congress continued to actively shape the scope of tribal sovereign immunity. For example, Congress expressly preserved tribal immunity in the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322,

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[10] This particular section allowed Clarence Turner to sue the Creek Nation for damages resulting from an 1890 incident in which a group of Creek citizens destroyed his fence. The Court of Claims dismissed Turner's claims for failure to state a claim, and this Court affirmed. *Turner v. United States*, 51 Ct. Cl. 125 (1916), *aff'd*, 248 U.S. 354 (1919).

§ 1121(3), 130 Stat. 1628 (2016) (providing that "[t]he Secretary shall not require an Indian tribe to waive the sovereign immunity of the Indian tribe as a condition to entering into a cost-sharing agreement under this subsection"). Conversely, Congress abrogated tribal sovereign immunity in the Bill Williams River Water Rights Settlement Act of 2014, Pub. L. No. 113-223, § 7(b), 128 Stat. 2096, 2107-08 (2014) (stating that for any civil action relating "directly to the interpretation or enforcement of this Act" or the various agreements referred to therein, "the Tribe and the United States . . . may be named as a party or joined in the civil action" and "any claim by the Tribe or the United States . . . to sovereign immunity from the civil action is waived").

Congress also continues to stay abreast of the decisions of this Court and lower federal courts. Recently, following a dispute regarding the assertion of tribal sovereign immunity in a patent proceeding, Congress held hearings with witnesses testifying for and against various proposals that would waive such immunity. *See generally Sovereign Immunity and the Intellectual Property System*: *Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 7, 2017); S. 1948, 115th Cong. (S. McCaskill sponsor) (bill would abrogate tribal sovereign immunity in certain patent actions).

Congress' decision to abrogate in certain situations and not in others weighs heavily against the Washington Supreme Court's decision to take it upon

itself to carve out an exception to tribal sovereign immunity for *in rem* actions. *See Bay Mills*, 134 S. Ct. at 2031 (reiterating that "tribal immunity is a matter of federal law and is not subject to diminution by the States") (internal quotations and citations omitted). Consistent "approval of the immunity doctrine . . . reflect[s] Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotations omitted). Congress is the body with power over Indian affairs, and these are policy judgments best left to that body.

IV. THE CONGRESSIONAL POLICY OF RESTORING THE TRIBAL LAND BASE ALSO COUNSELS AGAINST AN EXCEPTION TO SOVEREIGN IMMUNITY FOR TRIBAL LAND.

The reasons that sovereign immunity protects against involuntary loss of land apply with particular force to tribal nations. The tragic history of tribal land loss is well known. While much of this loss came from public acts, much was also the result of private illegal occupation, fraudulent foreclosures, and tax sales of individually owned allotments. This case, in fact, stems from the Upper Skagit Tribe's own 150-year struggle to rebuild its land base.

Protecting tribal land has long been part of federal policy. Therefore, while sovereign immunity protects

all sovereigns from private suits claiming their property, for tribal nations this is a matter of their very survival, and for the United States a matter of federal obligation.

A. Tribes Have Been Particularly Scarred By Illegal Occupation Of Their Land.

"Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations." *Cohen's Handbook of Federal Indian Law* § 15.01, at 994-95 (Nell Jessup Newton ed. 2012). "We are the land" is a sentiment shared by many tribes. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615, 1640 (2000) (citation omitted). Land is intimately linked to the origin stories, the religious practice, and the very identity of tribal peoples. *Id.* The struggle to preserve aboriginal lands, therefore, is a central part of Native struggles for self-preservation and self-determination.

Until recently, this struggle was marked solely by loss. Chief Justice John Marshall remarked on this tragic history as early as 1831, noting in *Cherokee Nation* that "[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." 30 U.S. at 15. The Cherokee Nation, he wrote, was once in "uncontrolled possession of an ample domain," but had "yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue." *Id.* "To preserve this remnant," he continued, "the present application is made." *Id.*

Although Justice Marshall wrote of land lost in treaties, much land loss began with illegal private occupation. The Cherokee cases themselves stemmed from the illegal claims of Georgia settlers to Cherokee lands and gold. *See* Stephen Breyer, ***Making Our Democracy Work: A Judge's View*** 23-24 (2010). Although this Court held Georgia's claims "repugnant to the Constitution, laws, and treaties of the United States," *Worcester*, 31 U.S. at 561, the federal government ultimately bowed before Georgia's resistance, signing the unauthorized treaty that led to the Cherokee Trail of Tears. Breyer, *supra*, at 29-30. The Creek Trail of Tears began in this way as well, when, after the Creek Nation signed a treaty permitting Creek households to take allotments or voluntarily move West, "white persons, in large numbers, commenced flocking into the country, in order to select and take possession of the best lands," and "Indians were driven from their habitations and their homes by these lawless people." H.R. Rep. No. 31-37, at 25 (1851). Even as the U.S. acquired more and more land by treaty, commissioners complained that they still could not prevent land speculators from using "the most dishonorable expedients . . . to dispossess the Indians." Annual Report of Commissioner of Indian Affairs, Sen. Exec. Doc. 34-5 (Nov. 22, 1856).

Allotment to individual Indians spurred even more illegal acquisitions. Not satisfied with the land officially opened to settlement, non-Indians entered into illegal leases, and claimed land from fraudulent foreclosures and tax sales. *See, e.g.*, Brief for Historical and Legal Scholars, *Nebraska v. Parker*, 136 S. Ct. 1072

(2016) at 28-29 (describing history of the Omaha); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 Tulsa L. Rev. 21, 25-26 (2004) (describing illegal tax foreclosures on Odawa and Ojibwa allotments). Efforts to acquire Indian lands could be even more deadly. Private citizens burned the Odawa and Ojibwa allottees of Burt Lake out of their homes after the government declared tax foreclosures of their land invalid, Singel & Fletcher, *supra*, at 26-27, while Osage allottees suffered dozens of murders to acquire their valuable oil lands. *See* David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (2017).

Until recently, tribal nations experienced generation after generation of loss of ancestral homeland. Much of this loss started with illegal occupation or acquisition by private individuals. Reversing that history is not just about recovering land, it is about recovering the culture, identity, and autonomy that went with it.

B. The Disputed Land Here Is Part Of The Upper Skagit Tribe's Own History Of Land Loss.

On Respondents' part, of course, their claim to the land is not part of this tragic history. But for the Upper Skagit Tribe, it is. The Tribe was left landless by the Treaty of Point Elliott in 1855, and struggled for over a century to protect its people and culture without a reservation. Since the 1970s, the Tribe has gradually bought back about 500 acres (less than a square mile)

within its original homelands. This parcel is part of those lands.

The Tribe is the political successor to confederated Coast Salish peoples who have lived around the upper Samish and Skagit Rivers for thousands of years. *See* Upper Skagit Tribal Council, *A Petition to the U.S. Secretary of the Interior to Proclaim an Upper Skagit Reservation* Fig. 2 (Feb. 18, 1981) (hereinafter Reservation Petition) (map of territory of Upper Skagit aboriginal bands). The Upper Skagit ceded its lands in the Treaty of Point Elliott, believing it would get protected land and money in return. *See* Treaty with the Duwamish etc., 12 Stat. 927 (1855); AIPRC Report at 182. But although 23 tribes signed that treaty, the United States created only two reservations, and they were far south of the Upper Skagit territory. *Id.* Most tribal members chose to remain on their aboriginal lands, even though they were unprotected from white encroachment there. *See United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974); Miller, *supra*, at 94-95.

Nevertheless, the Upper Skagit continued as a tribal community. In 1913, Congress appropriated up to $250 for the Upper Skagit to purchase land that they were already using as a tribal cemetery. 38 Stat. 77, 101 (1913). In 1916, they built an Indian Shaker Church, which became a center of tribal coordination. Miller, *supra*, at 96. The Tribe participated in claims against the United States for failure to pay monies due under the Treaty of Point Elliott. *Duwamish v. United States*, 79 Ct. Cl. 530, 533 (1934); *Upper Skagit Tribe v.*

United States, 13 Ind. Cl. Comm'n 583 (1964). Tribal members also persistently asserted their treaty rights to fish free from onerous and discriminating state law restrictions. Miller, *supra*, at 96-97 (noting that without a reservation, their fishing rights began being restricted in 1897, and several Upper Skagit members were arrested for fishing in the 1960s). In 1974, Judge Boldt held that the Upper Skagit retained off-reservation fishing rights under the Treaty of Point Elliott. *United States v. Washington*, 384 F. Supp. 312, 400 (W.D. Wash. 1974). Soon after, the United States finally formally agreed that the Upper Skagit was a recognized Indian tribe and had been under federal jurisdiction since at least 1913. *Reservation Petition*, *supra*, at 5.

The Upper Skagit have worked continuously to restore the tribal land base. *See Reservation Petition*, *supra*, at 11-17 (describing efforts to purchase land between 1974 and 1981). In 1981, the United States formally recognized a 74-acre reservation. 46 Fed. Reg. 46,681 (Sept. 21, 1981). Since that time, the Upper Skagit have purchased approximately 500 acres of mostly contiguous land and have succeeded in having much of this land taken into trust. Miller, *supra*, at 98. The disputed property in this case adjoins that trust land, borders a tribal cemetery, and is believed to include the remains of tribal members lost to waves of smallpox that decimated the Tribe.

Respondents claim to view the disputed land as part of their "backyard," but for the Tribe it is much more. It is part of the homeland that was taken from

them long ago. Acquiring this land is part of their long journey to get at least a small portion of that homeland back.

C. Federal Law And Policy Has Long Prohibited Private Acquisitions Of Tribal Land.

For decades, the United States has recognized that restoring the tribal land base is part of its trust obligations. For hundreds of years before that, federal law has forbidden private acquisitions of tribal land. Although these laws do not apply to the off-reservation fee land here, the policy surely does. Particularly for Indian tribes, in other words, there is no exception to the federal common law immunity prohibiting private suits claiming sovereign land.

Federal law has always condemned private acquisitions of tribal land. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The earliest treaties provided for punishment of those settling on tribal land without federal consent.[11] The very first Congress prohibited private acquisitions of Indian land in the Trade and Intercourse Act, 1 Stat. 137-183 § 4 (1790). Although the United States often failed to enforce the law, it has remained in effect ever since. *See* 25 U.S.C. § 177.

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[11] *See, e.g.*, Treaty with the Wyandot etc., 7 Stat. 49, Art. VI (1795); Treaty with the Creeks, 7 Stat. 35, Art. VI (1790); Treaty with the Choctaws, 7 Stat. 22, Art. IV (1786); Treaty with Chickasaws, 7 Stat. 24, Art. IV (1786); Treaty with Cherokees, 7 Stat. 18, Art. V (1785).

Beginning with the 1934 Indian Reorganization Act, federal policy has been to protect and enhance the tribal land base. Act of June 18, 1934, 48 Stat. 984; *see* H.R. Rep. No. 73-184 (1934) (declaring purpose of act to "conserve and develop Indian lands" and purchase land for landless Indians); *Lara*, 541 U.S. at 202 (noting current federal policy of "protection of the tribal land base"). The Act applies perpetual trust status to all lands still in trust and authorizes return to tribal ownership of any unsold surplus lands and acquisition of lands to consolidate the tribal land base. 48 Stat. 984, §§ 2-3. These laws remain in effect, 25 U.S.C. §§ 5101-5106, reflecting Congress' determination that "a substantial tribal land base [is] essential to the existence of tribal society and culture." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 279 (1985) (quoting *Cohen's Handbook of Federal Indian Lau* 510 (1982 ed.).

The United States continues to pursue this policy. The Indian Land Consolidation Act of 1983 and the American Indian Probate Reform Act of 2004 both seek to consolidate the tribal land base by facilitating tribal acquisition of interests in lands. Pub. L. No. 97-459, 96 Stat. 2517 (1983); Pub. L. No. 108-374, 118 Stat. 1773 (Oct. 27, 2004), both *codified as amended at* 25 U.S.C. §§ 2201-2221. Numerous congressional and administrative acts have recognized new reservations for landless tribes. *See, e.g.*, Pub. L. No. 103-377, 108 Stat. 3501 (1994) (taking land into trust as initial reservation of the Mohegan Nation). As declared in a 2012 Report from the Senate Committee on Indian Affairs, "[r]eversing the history and circumstances of land loss

and the economic, social, and cultural consequences of that loss are at the core of the government's federal trust responsibility toward Indian tribes." S. Rep. No. 112-166, *4 (2012).

Permitting private parties like Respondents to bring claims against tribal land, therefore, would not only violate established rules of common law sovereign immunity, it would violate the federal policy of protecting tribal land and reversing tribal land loss.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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No. 17-387

In The
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
Petitioner,

v.

SHARLINE LUNDGREN, ET VIR,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* PUBLIC SERVICE COMPANY OF NEW MEXICO IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does a court's exercise of in rem jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

CORPORATE DISCLOSURE STATEMENT

Public Service Company of New Mexico is a New Mexico corporation. PNM Resources, Inc., its parent corporation, is a publicly-traded New Mexico corporation. PNM Resources, Inc. owns 100 percent of the common stock of Public Service Company of New Mexico.

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STATEMENT OF INTEREST[1]

Public Service Company of New Mexico ("PNM") is a public utility providing electric power to much of New Mexico. As such, PNM has been granted the power of eminent domain so that, if negotiations with landowners fail, the company may use condemnation to obtain rights-of-way needed to serve the public. Indeed, many utilities across the country routinely use eminent domain to construct and operate critical infrastructure, such as oil, gas, and water pipelines as well as electric transmission lines. In some cases, the right-of-way at issue may involve land in which an Indian tribe holds an interest, a circumstance that sometimes may implicate federal statutory issues as well as the doctrine of tribal sovereign immunity.

In the instant case, the Upper Skagit Indian Tribe (the "Tribe") seeks a very broad rule, arguing that tribal sovereign immunity *always* bars the exercise of *in rem* jurisdiction unless the tribe has waived sovereign immunity or Congress has unequivocally abrogated it. The outcome of this case potentially affects PNM – and many other public utilities – in at least three ways.

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[1] Pursuant to Sup. Ct. R. 37.6, PNM states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from PNM, made any monetary contribution toward the preparation or submission of this brief. Counsel for the parties have given their consent to the filing of this *amicus* brief.

1. First and foremost, PNM has filed a petition for *certiorari* in a separate case, and that petition is now pending before this Court. *See Pub. Serv. Co. of N.M. v. Barboan*, *petition for cert. filed* Nov. 20, 2017 (No. 17-756).[2] There is overlap between the question presented in *Upper Skagit*, as framed by the Tribe, and at least one of the two questions presented by PNM's petition. Depending on the outcome and breadth of the Court's opinion, the result here could effectively decide PNM's related question one way or the other, or it could leave that question for another day.

PNM's case involves a federal statute, 25 U.S.C. § 357,[3] which allows the condemnation of allotment land on the same basis that land owned in fee may be condemned.[4] The first question presented by PNM's petition asks, in a nutshell, whether the condemnation authority granted by § 357 includes authority to condemn a right-of-way across allotment land, where an Indian tribe has acquired a fractional beneficial interest in the allotment

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[2] The briefs of the United States and other respondents in PNM's case are now due on March 23, 2018.

[3] Enacted in 1901, 25 U.S.C. § 357 states: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

[4] The term "allotment land" refers to land was once part of an Indian reservation but was carved out and "allotted" to individual members of the tribe as their own property, but held in trust by the United States.

land.[5] The result in *Upper Skagit* need not affect *that* question because the issue here does not involve § 357 or allotment land. There is overlap, however, between *Upper Skagit* and PNM's second question, which asks:

> If 25 U.S.C. § 357 authorizes such a condemnation action [of allotment land], may the action move forward if the Indian tribe invokes sovereign immunity and cannot be joined as a party to the action?

Inasmuch as condemnation is an *in rem* action, *United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946), the answer to PNM's second question could be affected by the Court's answer to the broad *in rem* question presented by the Tribe in *Upper Skagit*.

2. Leaving aside the issue of allotment land, public utilities also find it necessary to file condemnation actions to obtain rights-of-way across land owned in fee. If the acquisition by an Indian tribe of an interest in fee land were to preclude any *in rem* action with respect to that land, as the Tribe asks

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[5] Stated in full, the first question presented by PNM asks:

> Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which an Indian tribe has a fractional beneficial interest, especially where (a) the tribe holds less than a majority interest, (b) the purpose of condemnation is to maintain a long-standing right-of-way for a public utility, and (c) the statute was not "passed for the benefit of dependent Indian tribes." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)?

the Court to rule, then the ability of such utilities – including PNM – to acquire needed rights-of-way could be seriously limited.

3. Even where the utility already has acquired the right-of-way, disputes can arise over right-of-way boundaries or over the exercise of maintenance rights or other ancillary rights. In such cases, a remedy can be found in an action to quiet title or, similarly, in an action for declaratory judgment; however, if sovereign immunity precludes a court from adjudicating such disputes where the fee interest is held by an Indian tribe, harm to the public interest will occur.

PNM submits this *amicus* brief in order to call to the Court's attention the broad implications of the relief sought by the Tribe, and to ask the Court to resolve the case in a way that does not prejudice the rights of PNM or other public utilities with respect to their use of condemnation or their own use of quiet title and similar actions.

SUMMARY OF ARGUMENT

Like Sharline and Ray Lundgren, and others who have land disputes with their neighbors, public utilities sometimes have disputes with landowners whose tracts are subject to rights-of-way for utility infrastructure. It is important for all parties to have access to courts so that those disputes can be resolved. It is especially important for utilities to have such access because of the public interest that they are charged with serving. The Court should affirm the decision of the Supreme Court of Washington. If it

does not, landowners and utilities will be left without a legal remedy.

In serving the public interest, utilities also need to obtain rights-of-way for critical infrastructure, including not just electric transmission lines, but also gas, oil and water pipelines. The broad rule sought by the Tribe – which the Tribe would make applicable to all *in rem* actions – would harm the public interest by foreclosing condemnations whenever a tribe asserts sovereign immunity. Such a result conflicts with this Court's holding in *Carmack*, 329 U.S. at 235 n.2, which said that the jurisdiction of a court to hear a condemnation action does not turn upon the owner's participation in the case.

The broad rule sought by the Tribe is not necessary to resolve the *Upper Skagit* case now before the Court. If the Court were to rule that tribal sovereign immunity bars a quiet title action, PNM would urge the Court to write its opinion narrowly so as to (i) avoid any suggestion that *Carmack* is no longer good law, and (ii) leave room to reach a result favorable to eminent domain in a case where condemnation is at issue.

The petition for *certiorari* that PNM has pending before the Court deals with condemnation of allotment land – a special sort of condemnation proceeding expressly authorized by federal statute, 25 U.S.C. § 357. The land at issue in the case at bar is not allotment land, nor does the case involve § 357. With PNM's petition for *certiorari* pending, PNM urges the Court to decide *Upper Skagit* in a way that

will not prematurely and ad ersely decide the § 357 and allotment land issues presented by that petition.

ARGUMENT

There are many public utilities across the country, and the decision handed down in this case will set the law nationwide for many years. PNM would be remiss in its role as an *amicus curiae* – a friend of the Court – if it did not call to the Court's attention the problems that it sees lying ahead if the Court were to reverse the decision below.

The dispute between the Tribe and the Lundgrens involves an action to quiet title, not condemnation. Thus, it may be helpful for PNM first to discuss actions to quiet title and similar proceedings before turning to the need to protect the right of eminent domain.

I. By Preventing Courts from Resolving Disputes Between Utilities and Indian Tribes, the Broad Rule Sought by the Upper Skagit Would Harm the Public Interest.

The Lundgrens are private landowners, not a public utility. But, the Tribe's immunity arguments in the instant quiet title action are not tied to the plaintiffs' status as purely private parties. If the Tribe were to prevail in its view that tribal sovereign immunity *always* bars an action to quiet title on tribally claimed land, absent tribal waiver or Congressional abrogation, public utilities would also

be unable to bring such lawsuits – with resulting harm to the public interest.

Consider a situation in which a utility has already obtained the right-of-way and installed its infrastructure. Even though some issues have been resolved, the potential for disputes still remains. Rights-of-way typically carry with them ancillary rights to take reasonable steps to maintain the infrastructure. As one treatise has explained,

> The constituent ingredients [of an easement] frequently include not only a primary right, such as a right to a way across the servient tenement, but also supplementary or secondary rights that serve to effectuate the primary right, such as the privilege of entering on a servient tenement for needed acts of repair or maintenance of the way.

4-34 POWELL ON REAL PROPERTY § 34.12 (2017).

Thus, if the utility is a power company, it may decide that trees close to the line need to be cut back, or that paths need to be cut or cleared in order to give ready access to transmission towers and lines, so as to avoid delay in the event of an emergency. But, landowners sometimes disagree with the utility on whether the utility enjoys such ancillary rights or whether they are being exercised reasonably. If the owner of the fee interest decides to block actions the utility believes are necessary, the normal course of action would be to resolve the dispute in a court of law through a utility-initiated quiet title action or other

action adjudicating the competing property right claims. *See, e.g., Garza v. Am. Transmission Co. LLC*, 893 N.W.2d 1, 5 (Wis. 2017) (utility company forced to file declaratory judgment action confirming its right under existing easement to enter property and remove trees endangering operation of transmission line). Under the rule proposed by the Tribe, such legal remedies would not be available.

This is not just a hypothetical issue, as shown by the recent case of *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016).[6] In *Hamaatsa*, a private non-profit corporation (Hamaatsa) owned land adjacent to a tract owned in fee by a federally-recognized Indian tribe. The tribe had obtained the tract from the federal Bureau of Land Management through a quitclaim deed that reserved a public right-of-way for a long-established road connecting the Hamaatsa property to a state highway. Even so, the tribe claimed that Hamaatsa had no right to cross the tribe's tract and that, by using the road, Hamaatsa was committing trespass.

Confronted by these claims, Hamaatsa sued the tribe in a New Mexico court and, seeking relief akin to quieting title, asked for a declaratory judgment that it had the right to use the road at issue. In response, the tribe claimed that the matter could not be resolved by the court because the tribe had sovereign immunity and, thus, was immune from suit. Despite victories in the trial court and the

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[6] PNM takes no position on the merits of the underlying dispute between Hamaatsa and the tribe. The case is significant because it illustrates the use of sovereign immunity in the context of a right-of-way dispute.

intermediate appellate court, Hamaatsa ultimately lost. Guided by its view of federal law, the New Mexico Supreme Court ruled that, because the tribe invoked sovereign immunity, the suit must be dismissed for lack of subject matter jurisdiction. 388 P.3d at 985.

This is exactly the rule sought by the Upper Skagit in the case at bar; and, by preventing the adjudication of such disputes, such a result would undermine the rule of law. This Court should not follow such a path, and as Respondents have convincingly shown, there are overwhelming reasons for rejecting any invitation to do so.

II. By Barring Use of Eminent Domain to Acquire Rights-of-Way, the Broad Rule Sought by the Upper Skagit Would Harm the Public Interest.

Although the instant case does not involve condemnation, the Tribe has proposed a broad rule that, by its terms, would apply to *all* actions *in rem*, where an Indian tribe holds an interest in the property at issue. Condemnation is an *in rem* action, *see Carmack*, *supra*, and, thus, would fall under the proposed rule. *See* Resp. Br. at 35-37. As stated by the Tribe, "[t]ribal sovereign immunity mandates dismissal of *in rem* actions involving tribal property." Pet. Br. at 13. No exception is suggested for any subset of *in rem* actions. If adopted by the Court, such a rule could greatly limit the exercise of eminent domain, especially in States where Indian tribes, like

the Upper Skagit, are actively acquiring lands, including lands held in fee.

Suppose that a public utility or, for that matter, a local government, finds that the public interest requires the acquisition of a right-of-way along a route that crosses three tracts of land. One is owned in fee by the Jones family, another by Acme Corporation, and the third by an Indian tribe. Perhaps, the route is needed for an electric transmission line, or for a water, oil or gas pipeline. Or, perhaps, the route is needed to build a new road or to widen an existing one. In such a situation, the condemnation could proceed against the tracts owned by the Jones family and Acme Corporation, but when the utility or government reached the land owned in fee by the Indian tribe, the project could encounter problems. Under the rule proposed by the Tribe, condemnation could not proceed without tribal consent, even where the project is badly needed, even where no other route is feasible and even though the law – indeed, the Constitution – assures the Indian tribe of just compensation for any interest that would be acquired. (Condemnation of a right-of-way typically requires all of the affected property interests to be subject to the taking.[7] Thus, if no such tribal ownership existed, an individual owner could readily

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[7] *See, generally*, N.M. Stat. § 42A-1-17(D) (condemnation petition must, among other things, name as defendants "all the parties who own or occupy the property or have any interest therein as may be ascertained by a search of the county records"); Fed. R. Civ. P. 71.1 (in an eminent domain case, "before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records...").

achieve the same objective by conveying some fractional interest to a tribe.) Vesting such a veto power in any owner would be a drastic result, and would allow that owner either to frustrate the public interest by excluding the infrastructure or leveraging large payments well above fair market value, thereby impacting consumers.[8]

The problem is illustrated by *Davilla v. Enable Midstream Partners*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017), which involved a gas transmission line that had served the public for over thirty years. The original easement was granted by the Bureau of Indian Affairs ("BIA") for a term of years and, when it expired, the company sought to renew the right-of-way by condemnation. But, its efforts were blocked by individual Kiowa Indian allottees, who noted that, a few years earlier, the Kiowa Tribe acquired a small fractional interest (1.1%) in their parcel. The district court held that this tribal acquisition prevented condemnation, found that the company was trespassing, and ordered the pipeline removed. *Id.* at 1235, 1239.[9]

The Upper Skagit have a close connection to the tract containing the strip at issue here. The tract

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[8] To suggest that an Indian tribe might make such demands is not meant as a criticism. If this Court were to recognize the rights sought here by the Upper Skagit, it would be perfectly reasonable to expect the tribes to exercise those rights.

[9] Enable has appealed to the Tenth Circuit. *See Davilla*, No. 5:15-cv-1262 (W. D. Okla.) at Dkt. No. 60 (filed Apr. 25, 2017), *appeal docketed*, No. 17-6088. The district court later delayed removal of the pipeline pending settlement discussions. *See id.* at Dkt. No. 78 (entered Sept. 5, 2017).

was once part of their ancestral lands, and it lies across the highway from land held in trust for the Tribe by the United States. U.S. Br. at 2. But, the broad rule the Tribe proposes does not require any such connection in order to prohibit an action *in rem* (nor could any rule feasibly do so). Instead, a tribe could acquire a fee interest in land anywhere in the United States, and the tribe's sovereign immunity would block any condemnation of that land. This, too, is problematic.

III. Condemnation Cases Should Be Allowed, Even If Quiet Title Cases Are Barred.

PNM supports the broad availability of state and federal courts to resolve differences over interests in land, including quiet title actions. But, even if the Court were to rule for the Tribe in the case at bar, based on tribal sovereign immunity, the Court should not adopt a rule so broad that condemnation actions are also foreclosed. There are significant differences that argue in favor of allowing condemnation cases to proceed, even if quiet title cases are barred.

In a quiet title case, the party bringing the action would typically be acting in a purely private capacity, as the Lundgrens are doing here. By contrast, when a utility brings a condemnation action, it is only because the sovereign (typically, a State) has *delegated* that power to the utility as a means of advancing the public interest. *E.g., Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) ("The power of eminent domain . . . is an attribute of sovereignty . . ."); *Pollard v. Hagan*, 44 U.S. 212, 223 (1845) (recognizing eminent domain as a "sovereign

power"); *Olcott v. Supervisors*, 83 U.S. 678, 691 (1872) (noting that "building a railroad or a canal by an incorporated company was an act done for a public use, and thus the power of the legislature to delegate to such a company the state right of eminent domain was justified."). Thus, in a quiet title case, such as the one here, the interests of a tribal sovereign are positioned against purely private interests. But, in a condemnation case, the interests of the *tribal* sovereign would be positioned against the interests of the *state* sovereign.[10]

Both cases would, of course, implicate the jurisdiction of the tribunal to hear the dispute, and that jurisdiction is obviously one aspect of sovereignty. But, in a condemnation action, more aspects of sovereignty are at stake than the power of the State to resolve disputes within its borders. As the words "eminent domain" imply, what is also at stake is the sovereign authority of the State to have ultimate control over its territory and to provide for the welfare of its residents. Thus, the calculus is different. Even if tribal sovereignty were to prevail in quiet title cases, the same result need not be reached in cases involving eminent domain.

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[10] Thus, condemnation cases brought against land where a tribe holds an interest are distinguishable from cases where purely private parties seek to sue a sovereign, which is the context in which sovereign immunity is most often discussed. *See, e.g.*, *The Federalist* No. 81, at 548 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of *an individual* without its consent.") (emphasis added); *Sossaman v. Texas*, 563 U.S. 277, 283 (2011) ("Immunity from *private* suits has long been considered 'central to sovereign dignity.'") (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Indeed, the United States seems to agree – at least, implicitly – that this is not the case to decide the fate of condemnation actions brought against land in which an Indian tribe holds an interest. In filing an *amicus* brief in support of the Tribe, the United States felt compelled to reframe and narrow the question presented. Instead of following the lead of the Tribe and addressing *all* actions *in rem*, the question presented by the United States *only* addresses actions to quiet title.[11]

Taking into account considerations of "equity and good conscience," the Supreme Court of Washington determined that the Tribe was not an indispensable party whose absence would require dismissal of the action. J.A. 113-15 (applying Wash. CR 19, the state counterpart to Fed. R. Civ. P. 19). In a condemnation action, considerations of equity and good conscience argue even more strongly in favor of allowing the action to proceed. Whatever interest in land the landowner may lose will be matched by payment of the constitutionally-required "just compensation." U.S. Const. amend. V. This is so whether the landowner comes to court or not. And, on the other side of the ledger, the benefits from the condemnation will flow to the public at large, including the tribe and its individual members. *See, e.g., Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982) (finding that individual Indians "benefit as

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[11] As reframed by the United States, the question presented reads: "Whether the sovereign immunity of a federally recognized Indian tribe bars an action against the Tribe *to quiet title* to property purchased by the Tribe outside of its reservation, where the Tribe has not waived its immunity and Congress has not unequivocally abrogated the Tribe's immunity." U.S. Br. at i (emphasis added).

much from public projects as do . . . non-Indian property owners"). Finally, as this Court held in *Carmack*, the jurisdiction of a court to hear a condemnation action does not turn upon the owner's participation in the case. 329 U.S. at 235 n.2 (citing *United States v. Dunnington*, 146 U.S. 338, 352 (1892); *In re Condemnation Suits by United States*, 234 F. 443, 445 (D. Tenn. 1916)). Thus, the inability to join an Indian tribe as a party, due to the tribe's assertion of sovereign immunity, should not preclude the condemnation action from moving forward.

In sum, whatever the Court may decide about quiet title actions where a tribe abstains from participating (and, again, PNM believes such actions should be allowed to proceed), there is a clear basis for allowing condemnation actions to proceed. The Court's decision here should not suggest otherwise.

IV. Condemnation of "Allotment Land" Should Not Be Foreclosed.

As noted at the beginning, PNM has a pending petition for *certiorari* that presents questions that overlap with the question presented here and that deal specifically with the condemnation of rights-of-way across allotment land. Whether the Court addresses the broad "*in rem*" question posed by the Tribe or the narrower "quiet title" question posed by the United States, the rationale used by the Court could affect PNM's case. In asking the Court to avoid any premature or unintended consequences from its *Upper Skagit* decision, PNM believes strongly that the condemnation of rights-of-way, whether across fee land or allotment land, should not be foreclosed by

tribal sovereign immunity; however, should the Court apply its decision to a range of cases broader than quiet title actions, then there are special considerations that favor condemnation of rights of way across allotment land that do not apply to condemnation of rights of way across tribally-owned fee land. In support of this point, PNM believes it may be helpful to highlight some key distinctions between the condemnation of *allotment* land and the condemnation of *fee* land:

- First, while individual Indians and Indian tribes can and do hold *beneficial* interests in allotment land, the *legal title* is held by the United States as trustee.[12] The United States has waived its sovereignty for condemnation of allotment land.[13]

- Second, a federal statute, 25 U.S.C. § 357, specifically provides for condemnation of allotment land. *See supra*, n.3 (text of statute).

- Third, condemnation of fee land owned by a tribe typically does not require the joining of the United States as a defendant; however, condemnation of allotment land always requires joining the United States as a defendant,[14] thus providing the Indian

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12 *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (explaining that, in 1934, Congress "extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands.").

13 *Minnesota v. United States*, 305 U.S. 382, 388 (1939); *Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011).

14 *Minnesota*, 305 U.S. at 386.

tribe with a voice to represents its interests even if the tribe chooses not to participate on its own.

- Fourth, while condemnation of land held in fee typically occurs in state courts, condemnation of allotment land can only take place in courts of the United States,[15] the sovereign under whose umbrella Indian tribes exercise their special legal status. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014).

- Fifth, there are many parcels of allotment land now crossed by expensive utility infrastructure using rights-of-way granted by the BIA years ago. These BIA-granted rights-of-way are granted for a term of years and, as they expire, they will need to be renewed. If the requisite landowner consents cannot be obtained, the BIA cannot renew the easement, and the utility will need to seek renewal by condemnation. But, under the broad rule sought by the Tribe, an Indian tribe's acquisition of any interest in an allotment parcel would stop the condemnation. The problem is magnified by the BIA's "buy-back" program under which the agency is spending $1.9 billion through 2022 to buy small fractional beneficial interests from individual allotment owners in order to convey those interests to tribes.[16]

In short, there are special considerations that come into play to favor the condemnation of rights-of-way across allotment land that do not apply in all *in*

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[15] *Minnesota*, 305 U.S. at 386.

[16] *See* U.S. Department of the Interior, *Land Buy-Back Program for Tribal Nations*, https://www.doi.gov/buybackprogram.

rem cases or, indeed, in condemnation cases involving tribally-owned fee land. While this is not the time to decide the merits of PNM's case, PNM urges the Court not to embrace a rule or rationale in *Upper Skagit* that will foreclose or prejudice PNM's position when it comes time for the Court to consider this public utility's petition for *certiorari*.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed. If, however, the Court rules for the Tribe in this quiet title case, the Court should leave for another day whether tribal sovereign immunity bars condemnation actions against tribally-owned land, including allotment land in which a tribe holds some beneficial interest.

Respectfully submitted, February 28, 2018

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No. 17-387

In the Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,
Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMICUS CURIAE SENECA COUNTY, NEW YORK IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Seneca County, New York ("Seneca County") is a political subdivision of the State of New York. Seneca County has a strong interest in the question presented in this case because it regularly deals with regulation and taxation of real property within its jurisdiction that is owned in fee simple by the Cayuga Indian Nation of New York (the "Cayuga Nation"), another federally recognized Indian Nation. In particular, the issue of whether tribal sovereign immunity bars an *in rem* foreclosure proceeding for nonpayment of real property taxes against Cayuga Nation-owned lands is a dispute that is currently before the United States District Court for the Western District of New York on cross-motions for summary judgment. *See Cayuga Indian Nation of New York v. Seneca County*, Civil Action No. 11-cv-6004-CJS (W.D.N.Y.). The Upper Skagit Indian Tribe's argument before this Court relies upon the Second Circuit's affirmance of the preliminary injunction that was previously granted in *Cayuga Indian Nation of New York v. Seneca County*. *See* Br. for Pet. at 20, 23-24 (citing *Cayuga Indian Nation of New York v. Seneca County*, 716 F.3d 218, 221 (2d Cir. 2014)).

In its cross-motion for summary judgment currently pending before the District Court, Seneca County has argued that the doctrine of tribal sovereign immunity does not bar an *in rem* tax foreclosure proceeding

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[1] This *amicus* brief is presented pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States, as this brief is presented on behalf of a county and is submitted by its authorized law officer.

against Cayuga Nation-owned properties owned in fee simple and over which the Cayuga Nation does not have sovereign control. The Cayuga Nation maintains that the *in rem* foreclosure proceeding is indeed barred due to tribal sovereign immunity. Thus, this Court's answer to the question presented here—*i.e.* whether tribal sovereign immunity deprives a state court of jurisdiction to hear an *in rem* proceeding concerning real property owned by an Indian Nation in fee simple—could potentially determine the outcome of the pending dispute in *Cayuga Indian Nation of New York v. Seneca County*.

SUMMARY OF THE ARGUMENT

I. This Court's decisions in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"), and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*Sherrill*"), demonstrate that tribal sovereign immunity does not extend to *in rem* proceedings involving real property owned in fee simple by an Indian Nation. The principles underlying sovereign immunity generally (whether of the U.S. government, one of the several States, a foreign sovereign, or an Indian Nation) do not justify extension of tribal sovereign immunity to *in rem* proceedings involving unrestricted fee titled lands, located outside of an Indian tribe's sovereign control.

A. *Yakima* dealt with more than tribal immunity from taxation. This Court held that the power to assess and to collect real property taxes imposed on unrestricted fee lands (through *in rem* foreclosure proceedings) does not implicate tribal sovereignty or its

corollary—immunity from suit. *Yakima*, 502 U.S. at 263-64.

B. In *Sherrill*, which arose from an *in rem* eviction proceeding, this Court rejected the Oneida Indian Nation's asserted sovereign immunity from taxation and from enforcement thereof with respect to lands over which the Nation's "embers of sovereignty [had] long ago [grown] cold." *Sherrill*, 544 U.S. at 214. This Court affirmed the City of Sherrill's authority to both foreclose on the tribe's land for nonpayment of taxes and to evict the Oneida Indian Nation based upon such foreclosure, reversing the Second Circuit's decision, which had expressly held that the Oneida Indian Nation was entitled to sovereign immunity from the eviction proceeding.

C. While sovereign immunity bars disputes concerning real property claimed by a sovereign from being heard within the sovereign's own courts, disputes concerning real property owned by a sovereign outside of its jurisdiction may be heard in the courts of the second sovereign. States are not immune from suit with respect to property owned in a different State because such a suit "could hardly interfere with [the State's] capacity to fulfill its own sovereign responsibilities." *See Nevada v. Hall*, 440 U.S. 410, 424 n. 24 (1979); *see also Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) (Georgia could not "claim privilege or immunity" with respect to a condemnation proceeding involving land it owned within Tennessee). Furthermore, as a matter of international practice, a foreign state is not immune from suit within the United States as to "any case . . . in which . . . rights in immovable property . . . are in issue." *See Perm.*

Mission of India to the UN v. City of N.Y., 551 U.S. 193, 199 (2007).

D. The extension of tribal sovereign immunity to *in personam* suits against Indian tribes related to off reservation commercial activity is based upon notions of "promot[ing] economic development and tribal self-sufficiency." *See, e.g., Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 757 (1998). The goal of tribal self-sufficiency does not provide a basis to extend tribal sovereign immunity to *in rem* proceedings to determine rights in freely alienable fee titled lands.

II. To the extent this Court is inclined to overturn the Washington Supreme Court's decision, it should decline to make a sweeping determination that tribal sovereign immunity bars all *in rem* proceedings directed to any property owned in fee title by an Indian Nation. Such a holding would eviscerate this Court's holding in *Sherrill*. Moreover, it would be contrary to this Court's continued concern that taxing authorities—which have no adequate alternatives to tax foreclosure and have no control over Indian Nations purchasing properties within the State's jurisdiction—are left without a remedy.

ARGUMENT

I. The Bounds Of Tribal Sovereign Immunity From Suit Do Not Extend To *In Rem* Proceedings Involving Freely Alienable, Non-Sovereign Lands Owned In Fee Title By An Indian Tribe.

Tribal sovereign immunity bars suits *against* Indian tribes unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754; *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (Indian tribes are "domestic dependent nations" and thus "are subject to plenary control by Congress"). As noted by Petitioner, tribal immunity from suit is a common law doctrine that developed as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)); *see also* Br. of Pet. at 14. This Court has been reluctant to dispense with or limit the doctrine given "Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Okla. Tax Comm'n v. Citizen Band of Potowatomi Tribe of Okla.*, 498 U.S. 505, 510 (1991) (quoting *Cali. v. Cabazon Band of Mission Indians*, 470 U.S. 202, 216 (1987)).

But tribal sovereign immunity is "a judicial doctrine" and this Court has "taken the lead in

drawing" its "bounds."[2] *Kiowa*, 523 U.S. at 759. In other words, courts define the reach of the doctrine, and defer to Congress to define any exceptions thereto. It is clear that tribal sovereign immunity bars suits *against* Indian tribes themselves. But this Court's decisions in *Yakima* and *Sherrill* also make clear that the bounds of tribal sovereign immunity do not reach *in rem* proceedings involving real property owned in fee simple by an Indian Nation, like any other private landowner. The principles underlying sovereign immunity generally (whether the sovereign is the U.S. government, one of the several States, a foreign sovereign, or an Indian Nation) do not justify extension of tribal sovereign immunity to *in rem* proceedings involving unrestricted fee titled lands, located outside of an Indian tribe's sovereign control.

A. *Yakima* Upheld The Assertion Of *In Rem* Jurisdiction Over Freely Alienable, Fee-Titled Lands.

In *Yakima*, this Court upheld efforts by the County of Yakima in Washington State to foreclose on real

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[2] That tribal sovereign immunity is a judicial doctrine—the bounds of which are drawn by the courts—is further demonstrated by lower court decisions extending tribal sovereign immunity to tribal entities deemed to be an "arm of the tribe." *See, e.g., Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) (allowing tribal entities to share in an Indian tribe's immunity from suit depending on: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities").

property held in fee title by an Indian tribe for delinquent property taxes. *See Yakima*, 502 U.S. at 264-65. The land at issue was located in the Yakima Indian Reservation, which was established by treaty in 1855. Eighty percent of the reservation land was held in trust by the United States for the tribe's benefit, and the remaining twenty percent was owned in fee title, including by the Yakima Indian Nation itself. *Id.* at 254-56. This fee-titled land had been freed from restrictions on alienation through the Indian General Allotment Act of 1887 ("IGA"), in an effort "to extinguish tribal sovereignty." *Id.*

Yakima County had imposed an *ad valorem* tax on the tribe's fee-titled properties located within its reservation "without incident for some time." *Id.* at 256. But when the tribe stopped paying these taxes, the County brought *in rem* proceedings to foreclose properties owned by the tribe in fee title, among others. *Id.* The tribe argued that federal law prohibited the imposition of taxes on lands owned by the tribe because they were reservation lands. *Id.* This Court held that while states are typically without power to tax reservation lands, a 1906 amendment to the IGA (*i.e.* the Burke Act proviso) unequivocally subjected Indian allottees thereunder to state tax laws. *Id.* at 258. As a result, the County could lawfully tax the fee-titled reservation lands.

Importantly, the Court went on to also hold that the County could assert jurisdiction over the fee-titled lands in *Yakima* because "the jurisdiction [was] *in rem*

rather than *in personam*."[3] *Id.* at 265. It reasoned that "[w]hile the *in personam* jurisdiction over reservation Indians at issue in *Moe* [*v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976),] would have been significantly disruptive of tribal self-government, the mere power to assess *and collect* a tax on certain real estate is not." *Id.* at 265; *see also City of N.Y. v. Perm. Mission of India to the UN*, 446 F.3d 365, 374 (2d Cir. 2006) (citing *Schooner Exchange v. M'Faddon*, 11 U.S. 116, 125 (1812)) (noting the longstanding principle that "property ownership is not an inherently sovereign function"). Because the land had been "rendered . . . alienable and encumberable" under to the IGA, the land was also "render[ed] . . . subject to assessment *and forced sale for taxes*." *Yakima*, 502 U.S. at 263-64. So in *Yakima*, this Court held that the power to assess *and to collect* (through *in rem* foreclosure proceedings) real property taxes imposed on unrestricted fee lands does not implicate tribal sovereignty or its corollary—immunity from suit.

Petitioner argues that *Yakima* only dealt with "tribal immunity from taxation." *See* Br. of Pet. at 17. But if that was true, the Court could have ended its analysis of the *ad valorem* tax issue with the Burke Act proviso. *Yakima* arose from an *in rem* foreclosure proceeding and the Supreme Court's express holding

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[3] This Court held, pursuant to Washington State foreclosure law, that the real property taxes "create[d] a burden on the property alone," and that the "[l]iability for the *ad valorem* taxes flows exclusively from ownership of realty on the annual date of assessment." *Yakima*, 502 U.S. at 266 (Wash. Rev. Code § 84.60.020).

that the County could *collect* the taxes through a *forced sale* demonstrates that the Court had remedies, not only rights, in mind when it decided *Yakima*.

B. *Sherrill* Upheld The Assertion Of *In Rem* Jurisdiction Over Fee-Titled Lands Where The Indian Nation's "Embers Of Sovereignty . . . Long Ago Grew Cold."

In *Sherrill*, this Court affirmed the City of Sherrill's right to assess *and to collect*, including through *in rem* proceedings, *ad valorem* property taxes on fee lands recently purchased by the Oneida Indian Nation. That decision did not draw a distinction between the right to tax the land and the right to enforce those taxes through *in rem* foreclosure and eviction proceedings, and indeed no such valid distinction may be drawn.

Sherrill arose from an eviction proceeding, following the City of Sherrill having obtained title to the parcels through tax foreclosure proceedings.[4] *See Oneida*

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[4] *In rem* and *in personam* jurisdiction are described in *Shaffer v. Heitner*, 433 U.S. 186 (1977):

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of [the plaintiff]. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Id. at 199. Under New York law, a tax foreclosure proceeding is *in rem*. *See* N.Y. Real Property Tax Law ("RPTL") § 1120. No personal judgment may be entered under an *in rem* tax foreclosure

Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001). The Oneida Indian Nation had purchased fee title to the parcels through open market transactions in 1997 and 1998. *Sherrill*, 544 U.S. at 202. The parcels were located within the Oneida Indian Nation's historical reservation area, which was last possessed by the Oneidas as a tribal entity in 1805. *Id.*

Invoking tribal sovereign immunity, the Oneida Indian Nation sought a declaration that its lands were not subject to taxation, and declarations that the City "may not . . . *attempt to collect* property taxes based upon lands owned and possessed by the Nation within Sherrill . . . that Sherrill's *purported conveyances of the properties for delinquency of taxes are null and void*, and that Sherrill *may not evict* the Nation from its lands . . ." *Id.* at 237 (emphasis added); Joint App'x, *City of Sherrill v. Oneida Indian Nation*, 2004 U.S. S. Ct. Briefs LEXIS 493, at *JA27 (Aug. 12, 2004) (Complaint filed by the Oneida Indian Nation on Feb. 2, 2000 in N.D.N.Y. Case No. 00-cv-223). The Oneida Indian Nation sought an injunction prohibiting the City from taxing its properties, and "prohibiting it from interfering with *the Nation's ownership and possession* of its lands and from any effort *to evict* the

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proceeding. *See Buffalo v. Cargill, Inc.*, 44 N.Y.2d 7, 15 (N.Y. 1978) (citing N.Y. RPTL § 1124). Similarly, a summary eviction proceeding to recover possession of real property is *in rem* and "purely possessory." N.Y. Real Property Actions and Proceedings Law § 713(5); *Allyn v. Markowitz*, 373 N.Y.S.2d 293, 294 (N.Y. Cnty. Ct. 1975); *see also* 12-129 Warren's Weed N.Y. Real Property, § 129.157 (2017) (same); Rasch's Landlord and Tenant § 29:7 (5th ed. 2017) ("A summary proceeding is a legal process of purely possessory character, and relates to real property only.").

Nation from such lands . . ." *Oneida Indian Nation*, 145 F. Supp. 2d at 237 (emphasis added).

The basis for the relief sought was the assertion that the Nation's sovereign immunity prevented not only the imposition of tax, but also the collection of tax through *in rem* foreclosure and eviction proceedings. *See Sherrill* Joint App'x, 2004 U.S. S. Ct. Briefs LEXIS 493, at *JA25 (alleging that the City's effort to foreclose on and evict the Nation from its properties "violate[s] the Nation's sovereign immunity, which derives from . . . federal common law"); *Oneida Indian Nation*, 145 F. Supp. 2d at 237-38; *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 144 (2d Cir. 2003). The Oneida Nation specifically asserted tribal sovereign immunity as an affirmative defense to the eviction action. *Oneida Indian Nation*, 145 F. Supp. 2d at 237-38; *Oneida Indian Nation*, 337 F.3d at 144. And the district court expressly held that the Nation was entitled to sovereign immunity from the *in rem* eviction petition. *Oneida Indian Nation*, 145 F. Supp. 2d at 260 (dismissing eviction petition because "the Nation [was] entitled to sovereign immunity *from suit*") (emphasis added).

Thus, the Oneida Indian Nation expressly put at issue sovereign immunity from enforcement mechanisms—including *in rem* foreclosure and subsequent eviction—not only sovereign immunity from taxation. The Oneida Indian Nation continued to press these arguments to this Court, to which it argued that the City's efforts to tax its real property "*and to enforce the tax by evicting the Oneidas from the land*" were impermissible. Br. of Resp. at 1, *City of Sherrill v. Oneida Indian Nation*, U.S. Case No. 03-855

(emphasis added); *see also id.* at 12 (arguing that its properties could not "be removed from Oneida possession through a state law property tax foreclosure").

The Court rejected the Oneida Indian Nation's argument that the City did not have regulatory authority over the parcels on the basis that the "acquisition of fee title to discrete parcels of historic reservation land [had] revived the Oneidas' ancient sovereignty piecemeal over each parcel." *See Sherrill*, 544 U.S. at 202, 214. The Court stated as follows:

> Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id. at 202-203. It held that "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214. Thus, the Oneida Indian Nation's tribal patchwork of land owned in fee simple was deemed subject to the full jurisdiction and taxing authority of State and local governments.

This Court's decision rejected every aspect of the Oneida Nation's asserted sovereign immunity from

taxation and from enforcement thereof, affirming the City of Sherrill's authority to both foreclose on the tribe's land for nonpayment of taxes and to evict the Oneida Indian Nation based upon such foreclosure. It reversed the Second Circuit's decision, which had expressly affirmed that the Oneida Indian Nation was entitled to sovereign immunity from the eviction proceeding—immunity from suit, not merely "tax immunity." This Court expressly stated that tribal immunity would not bar the *in rem* eviction proceeding:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by *Sherrill*. We disagree.

Sherrill, 544 U.S. at 214 n. 7. As a result, *Sherrill* necessarily reached, and rejected, the Oneida Indian Nation's claim that its sovereign immunity barred the underlying *in rem* eviction proceeding, and that the conveyances resulting from *in rem* foreclosure proceeding were therefore null and void.

C. The Principles Underlying Sovereign Immunity Do Not Justify The Extension of Tribal Sovereign Immunity To *In Rem* Proceedings Involving Land Owned By An Indian Tribe Outside of Its Sovereign Jurisdiction.

Although the Upper Skagit Indian Tribe asserts that the parcel at issue here is located within its "ancestral lands," the Tribe sold its lands in Washington State to the United States by treaty in 1855, the Tribe acquired fee title to the parcel in 2013 by statutory warranty deed, and the parcel is not held

in trust by the United States or located within a reservation. *See* Br. of Pet. at 5-6 (noting that the Tribe intends to apply to the federal government to take the parcel into trust, on the basis that it is contiguous with 500 acres of trust land previously secured). There is no basis to conclude that the parcel is not freely alienable or that the Tribe exercises sovereign control over it.[5]

As such, the parcel is akin to those at issue in *Sherrill—i.e.* the Upper Skagit Indian Tribe recently purchased the parcel through an open market transaction within its purported ancestral lands that were last possessed by the Tribe in 1855. So unless and until the parcel is taken into trust, the Tribe may not exercise sovereignty over it and it is subject to regulation by the State of Washington. *See Sherrill*, 544 U.S. at 220-21 (recognizing the land into trust process under 25 U.S.C. § 465 as the proper mechanism "to regain sovereign control over" tribal ancestral lands); *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (concluding, in light of *Sherrill*, that repurchased ancestral lands are subject to state and local zoning laws and regulations).

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[5] *Amici* National Congress of American Indians, *et al.*, suggest that the *in rem* proceeding is barred by tribal sovereign immunity because the lands at issue are inalienable "tribal lands." *See* Br. of *Amici Curiae* at 36. But the Upper Skagit Indian Tribe has not argued that the parcel at issue here is subject to restrictions on alienation under 25 U.S.C. § 177, and indeed such an argument could not withstand *Sherrill* given that the fee parcel was recently acquired on the open market. *See* Br. of *Amici Curiae* at 3; *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 269, 275-80 (2d Cir. 2005) (applying *Sherrill* to bar claim under the 25 U.S.C. § 177).

The law regarding sovereign immunity demonstrates that the application of immunity to disputes concerning land owned by a sovereign—whether the sovereign is the U.S. government, one of the several States, or a foreign government—depends on where the land is situated. While sovereign immunity bars disputes concerning real property claimed by a sovereign from being heard within the sovereign's *own courts*, disputes concerning real property owned by a sovereign outside of its jurisdiction may be heard in the courts of the second sovereign.

1. Federal and State Sovereign Immunity Applies Within The Sovereign's Own Jurisdiction.

Petitioner and its supporting *amici* argue in conclusory fashion that tribal sovereign immunity is coextensive with the sovereign immunity accorded to disputes over real property owned by the U.S. government or any of the several States *within their own courts*, even where the dispute involves real property located outside of the tribe's sovereign jurisdiction. But there is significant difference between the absolute immunity that a sovereign enjoys within its own jurisdiction and the immunity that a sovereign might enjoy in another sovereign's jurisdiction. Indeed, the "doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *See Nevada v. Hall*, 440 U.S. 410, 414 (1979) (describing "the source and scope of the traditional doctrine of sovereign immunity").

On the one hand, "the immunity of a truly independent sovereign from suit *in its own courts* has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Id.* at 414 (emphasis added); *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent *in its own courts*.") (emphasis added). That is why the United States is immune from suit with respect to disputes concerning real property claimed by it within its own jurisdiction, as referenced in several cases cited by Petitioner and supporting *amici*. *See, e.g.*, *Belknap v. Schild*, 161 U.S. 10, 16 (1896) ("'It is a familiar doctrine of the common law, that the sovereign cannot be sued *in his own courts* without his consent . . . This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States.'") (quoting *The Siren*, 74 U.S. 152 (1869)) (emphasis added).

On the other hand, whether or not a State enjoys immunity within the courts of another State is "a matter of comity"—*i.e.* "the voluntary decision of the second [sovereign] to respect the dignity of the first [sovereign]"—not a legal requirement. *Nevada*, 440 U.S. at 416; *see also id.* 418-19 (noting that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified"). States are not immune from suit in the courts of a different State as a matter of law because such a suit "could hardly interfere with [the State's] capacity to fulfill its own sovereign responsibilities." *Nevada*, 440 U.S. at 424 n. 24.

As such, in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), this Court held that the State of Georgia "cannot claim privilege or immunity" with respect to a condemnation proceeding involving land it owned within Tennessee. *Id.* at 480. The land Georgia had acquired within Tennessee "was held subject to the laws of the latter and to all the incidents of private ownership," and the "sovereignty of Georgia was not [thereby] extended into Tennessee."[6] *Id.* at 481; *see also State v. Hudson*, 231 Minn. 127, 130 (1950) (same); *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625, 629 (1957) (same).

The Supreme Court of North Dakota relied on *Chattanooga* in *Cass County Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685 (2002), to affirm a state court's exercise of jurisdiction over an *in rem* condemnation action involving "private land" that had been "purchased in fee by an Indian tribe," and which, like here, did not constitute reservation or trust lands. *Id.* at 693. The Court held that, "[u]nder these circumstances, the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated." *Id.* By extension of these principles, the Upper Skagit Indian Tribe cannot assert

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[6] *Chattanooga* did not turn on a general "consent" granted by the States to be sued by a sister State, as is urged by *Amici* Seneca Nation of Indians, *et al.* *See* Br. of *Amici Curiae* at 25 n 8. On the contrary, *Chattanooga* held that the "power of the city to condemn does not depend upon the consent or suability of the owners." 264 U.S. at 482-83 (noting further that Georgia's acceptance of the permission given it to acquire railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land).

its tribal sovereign immunity to bar an *in rem* proceeding regarding unrestricted fee title land over which it does not have sovereign control.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), which is relied upon by Petitioner and highlighted by its supporting *amici*, is inapposite because that case involved a claim by the Coeur d'Alene Tribe to Lake Coeur d'Alene, and various navigable rivers and streams that form part of its water system, located within the State of Idaho. The Court held that the case implicated Idaho's sovereign immunity because it involved a claim to "Idaho's sovereign interest in its lands and waters." *Id.* at 287. The Court held that the case was "unusual" in that it was essentially a "quiet title action which implicates special sovereignty interests" given that it sought to "divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.* at 281 (noting further that "navigable waters have historically been considered 'sovereign lands,'" and that state ownership of navigable waters is "an essential attribute of sovereignty").

In contrast, the Upper Skagit Indian Tribe does not have a sovereign interest or obligation with respect to the parcel at issue here, which is owned like any other private land within the State of Washington.

2. Foreign Sovereign Immunity Does Not Extend To *In Rem* Actions To Establish Rights In Immovable Property.

It is noteworthy that Petitioner fails entirely to mention, and its supporting *amici* only barely mention, that immunity does not apply to disputes concerning "rights in" real property owned by a foreign sovereign within the United States. Under foreign sovereign immunities law, a foreign state *is not immune* from "the jurisdiction of courts of the United States . . . in any case. . .in which. . .*rights in* immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4) (emphasis added). Foreign sovereign immunities law is codified in the Foreign Sovereign Immunities Act ("FSIA") of 1976. *See* 28 U.S.C. § 1604, 1605, 1607. That statute is a "codification of international [common] law at the time of the FSIA's enactment." *Perm. Mission of India to the UN v. City of N.Y.*, 551 U.S. 193, 199 (2007).

In particular, FSIA "'codif[ied]. . .the *pre-existing* real property exception to sovereign immunity recognized by international practice.'" *Id.* at 200 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (J. Scalia)). "This principle—when owning property here, a foreign state must follow the same rules as everyone else—long predated the restrictive theory of sovereign immunity and the FSIA." *City of N.Y. v. Perm. Mission of India to the UN*, 446 F.3d 365, 374 (2d Cir. 2006) (citing *Schooner Exchange v. M'Faddon*, 11 U.S. 116, 125 (1812)). For example, a foreign sovereign may not raise sovereign immunity as a defense in a state *in rem* condemnation action. *Id.* at 372 (citing *Restatement*

(Second) of Foreign Relations Law of the United States § 68(b), cmt. d). This exception comports with the longstanding principle that "property ownership is not an inherently sovereign function." *Perm. Mission*, 551 U.S. at 199 (citing *Schooner*, 11 U.S. at 116).

Although referred to as an immovable property "exception" to foreign sovereign immunity, that a foreign state is not immune from suit with respect to rights in immovable property is really a *limitation* on the reach of foreign sovereign immunity. *See Perm. Mission*, 551 U.S. at 199 ("a foreign sovereign's immunity *does not extend to* 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction'") (quoting *Restatement (Second) of Foreign Relations Law of the United States* § 68(b) (1965)); *see also Restatement (Third) of Foreign Relations Law of the United States* § 455(1) (1987)) ("Under international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims . . . (c) to immovable property in the state of the forum."); *id.*, cmt. b ("Title to land and to buildings on land traditionally is subject to adjudication by the courts of the state where the land is situated.").

Thus, in *Permanent Mission of India to the UN*, this Court held that the Permanent Mission of India to the United States was not immune from suit by the City of New York to declare the validity of tax liens against real property held by the sovereign for the purpose of housing its employees. 551 U.S. at 195. Like

Respondent's quiet title action, an action to establish validity of a tax lien "directly implicate[d] rights in property" and thus immunity did not apply. *Id.* at 201.

These principals of foreign sovereign immunities law, which predate codification in the FSIA, support the conclusion that tribal sovereign immunity does not extend to bar an *in rem* quiet title proceeding to determine rights in a real property parcel located within the jurisdiction of the State of Washington. To allow an Indian Nation to assert immunity with respect to an *in rem* proceeding concerning unrestricted fee titled lands located within a State's sovereign jurisdiction would give it "super-sovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's limits." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995).

D. The Extension Of Tribal Sovereign Immunity To Off Reservation Commercial Activities Does Not Provide A Basis To Extend Immunity To *In Rem* Proceedings To Determine Rights In Freely Alienable, Fee Titled Land.

Tribal sovereign immunity has been extended to *in personam* suits against Indian tribes related to off reservation commercial activities. *See Kiowa*, 523 U.S. at 758, 760 ("[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation"); *Bay Mills*, 134 S. Ct. at 2028-29 (applying sovereign immunity to bar a suit to enjoin gaming "off a reservation or other Indian lands"). These cases are distinguishable from, and do not support extending, tribal sovereign

immunity to bar an *in rem* proceeding concerning off reservation or other Indian lands.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, (1987), this Court precluded the State of California from exercising its jurisdiction to enforce state gambling laws on tribal bingo enterprises. *Id.* at 216. It held that allowing this state regulation would impermissibly burden "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)).

Similarly, in *Kiowa*, while noting that "[t]here are reasons to doubt the wisdom of perpetuating the [tribal sovereign immunity] doctrine," this Court noted that the doctrine had been retained "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Kiowa*, 523 U.S. at 757 (citing *Potawatomi*, 498 U.S. at 510); *see also* Bay Mills, 134 S. Ct. at 2041 (basing the "continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct" upon the notion that "[i]f Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal").

So, the application of tribal sovereign immunity to *in personam* suits against Indian tribes for off reservation commercial activities is an extension of the doctrine's purpose to encourage tribal self-sufficiency and economic development. Thus *Kiowa* and *Bay Mills*

do not, however, provide a basis to extend tribal sovereign immunity to *in rem* proceedings to determine rights in freely alienable fee titled lands.

II. Even If This Court Declines To Affirm the Washington Supreme Court's Decision, The Quiet Title Proceeding At Issue Here Is Potentially Distinguishable From An *In Rem* Tax Foreclosure Proceeding.

To the extent this Court is inclined to overturn the Washington Supreme Court's decision, it should decline to make a sweeping determination that tribal sovereign immunity bars all *in rem* proceedings directed to property owned by an Indian Nation. Such a holding would eviscerate this Court's holding in *Sherrill*, which rejected the Oneida Indian Nation's claim that its sovereign immunity barred the underlying *in rem* eviction proceeding, or that the *in rem* foreclosure proceeding was null and void. *See Sherrill*, 544 U.S. at 214.

Notably, while allowing an *in rem* foreclosure proceeding against freely alienable lands owned by an Indian Nation does not inherently implicate its sovereignty, barring such a proceeding would seriously burden the ability of the state and local municipalities to govern. *See id.* at 202 (noting that "a checkerboard of state and tribal jurisdiction—created unilaterally at [the tribe's] behest—would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

Additionally, extending the bounds of tribal sovereign immunity to bar an *in rem* tax foreclosure proceeding would be contrary to this Court's continued concern that taxing authorities—which have no control over Indian Nations purchasing fee title to properties on the open market within the State's jurisdiction—not be left without a remedy. In *Potawatomi*, the Court noted that while "sovereign immunity bar[red] the State from pursuing the most efficient remedy," it still had "adequate alternatives" to remedy the alleged wrong, including seeking damages from individual tribe members, collecting the sales tax from cigarette wholesalers, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. *Potawatomi*, 498 U.S. at 514. In *Bay Mills*, it was similarly significant to the Court's decision not to revisit *Kiowa* that Michigan had many "alternative remedies" to pursue the illegal gambling at issue and thus "ha[d] no need to sue the Tribe to right the wrong it allege[d]." *Bay Mills*, 134 S. Ct. at 2036 n. 8.

But this Court questioned whether it would extend tribal sovereign immunity to off reservation claims where the plaintiff has no alternative remedies for the alleged wrong:

> We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, *or other plaintiff who has not chosen to deal with a tribe*, has no alternative way to obtain relief for off-reservation commercial conduct. The

> argument that such cases would present a 'special justification' for abandoning precedent is not before us.

Bay Mills, 134 S. Ct. at 2036 n. 8 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In *Bay Mills*, "Michigan could bring a suit against tribal officials or employees for gambling without a license or could potentially prosecute anyone who maintains or frequents an unlawful gambling establishment." *Bay Mills*, 134 S. Ct. at 2035. In contrast, a foreclosure proceeding is the only means to recover unpaid real property taxes.[7] *See Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (noting that "no other means of recovery for unpaid property taxes exists"); *Oneida Indian Nation*, 145 F. Supp. 2d at 263 (concluding that it was "clear that the [Oneida Nation] representatives cannot be held personally liable for the unpaid property taxes"). Thus, to the extent this Court overturns the Washington Supreme Court decision, its determination should be limited to the facts presented here—an *in rem* quiet title proceeding brought by private parties to protect private rights.

---

[7] Respondents are in the best position to respond to the argument that they had adequate alternatives to the *in rem* quiet title action.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Brief for Respondents, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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No. 17-387

IN THE

Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN, *et vir,*

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR VILLAGE OF UNION SPRINGS, TOWN OF SPRINGPORT, AND CAYUGA COUNTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICI CURIAE

A. General Interests

Each of the *amici* local governments, Village of Union Springs (NY), Town of Springport (NY), and Cayuga County (NY)[1], exercises territorial sovereignty over real property located within its respective domains. As a natural incident of its territorial sovereignty, each local government imposes ad valorem real property taxes, exercises regulatory jurisdiction over real property that includes zoning and land use requirements, and, when appropriate, exercises eminent domain powers to acquire private lands for public benefit.

When a local government acts in relation to real property located within its territorial boundaries, it often does so through *in rem* legal proceedings. The enforcement of real property taxes, for example, is accomplished through tax foreclosure proceedings—foreclosing on a tax lien on the property—which is a quintessential *in rem* action against the property itself. It is not an action against the delinquent taxpayer. Revenue collected through *in rem* tax foreclosure proceedings—and publicly maintaining the legal right to

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[1] The authorized legal officer for each of the Village, Town and County amici is serving as co-counsel and listed on the brief, in accordance with Supreme Court Rule 37.4.

enforce its tax laws—is essential to raise revenue for local governments, including for law enforcement and emergency services. *See Dows v. City of Chicago*, 78 U.S. 108, 110 (1870) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.")

Eminent domain is another essential governmental power exercised through *in rem* proceedings. It enables local governments to create public roads, utility rights-of-way, and water and sewer service, for the benefit of the public.

Amici thus exemplify the powers, interests, and responsibilities of the local government subdivisions of the sovereign states. [2]

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[2] When this issue was last before the Court it attracted a great deal of support from state and local governments given the importance of the question presented: whether tribal immunity from suit blocks *in rem* tax foreclosure proceedings. Twelve states submitted a joint amicus brief in support of the Counties' petition for certiorari (New York, Alabama, Colorado, Florida, Idaho, Illinois, Michigan, New Mexico, North Dakota, South Dakota, Utah and Wyoming). The California State Association of Counties likewise filed an amicus brief, as did several New York counties and municipalities including the Town of Lennox. The case at bar has not drawn this kind of interest from state and local governments because the

B. Specific Experience of *Amici* with Tribal Sovereign Immunity Blocking Essential Government Enforcement Powers in Central New York.

The Village of Union Springs is located within the Town of Springport in Cayuga County, New York. These three related governmental entities lie within the Cayuga Indian Nation's historic land claim area. The actions taken by the Cayuga Indian Nation (CIN), detailed below, most directly impact the Village of Union Springs[3] but also harm the Town of Springport[4] and Cayuga County.[5]

---

case arises from a private lawsuit involving quiet title and adverse possession claims. That action does not involve governmental authority to collect taxes or condemn property located within a state sovereign's domain. Yet it is the potential for this Court's decision to reach those issues that makes an amicus submission from local governments appropriate on the merits.

[3] The Village was incorporated in 1848. Its population was recorded as 1,197 in the 2010 census. The Village consists of 1,120 acres located along Cayuga Lake. In contrast, CIN's historic land claim area—i.e., what the CIN unsuccessfully sought compensation for through a lawsuit in federal court (*Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 271 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006))—extends over a 64,000 acre swath of central New York. The land claim area covers large portions of Seneca and Cayuga Counties, and completely subsumes the Village of Union Springs.

[4] The Town of Springport was formed in 1823 and contains the Village of Union Springs. It has a

Each suffers the same obstructions against collection of taxes for public services. In demonstrating their respective interests as *amicus curiae*, the experience of the Village should be viewed as applying to the Town and County as well.

The Village is engaged in litigation in the Northern District of New York with a group of individuals who purport to represent the Cayuga Indian Nation (CIN). *See Cayuga Nation v. Tanner*, 824 F.3d 321, 326-30 (2d Cir. 2016).[6] The dispute arises from the CIN's decision to purchase land within the Village—acquired in open-market transactions from non-Indians in recent years and held in fee—

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population of 2,367 as reported in the 2010 Census. It covers an area of approximately 26.8 square miles.

[5] Cayuga County was established in 1799. It has a population of 80,026 as stated in the 2010 Census. The County is 864 square miles in area.

[6] The Cayuga Indian Nation has sued the Village and its code enforcement officer (and other Village officials) in the Northern District of New York on multiple occasions, as reported in the following decision: 293 F. Supp. 2d 183 (N.D.N.Y. 2003); 317 F. Supp. 2d 128 (N.D.N.Y. 2004); and 390 F. Supp. 2d 203 (N.D.N.Y. 2005). The Second Circuit decision cited above addressed "a long-standing leadership dispute within the Nation" that has divided the tribe into two groups. 824 F.3d at 326-30. For ease of reference here, this brief will refer to the individuals in their claimed representative capacity—as the Cayuga Indian Nation or CIN—although that capacity has not been legally determined and may never be resolved.

and unilaterally declare that land to be under tribal jurisdiction. The CIN claims the land is located within the Nation's historic former reservation, which has not been legally disestablished.

This Court's landmark decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) was supposed to have resolved all such disputes over whether a tribe or local government exercises sovereign authority over such "reacquired" former reservation lands. *Sherrill* rejected the Oneida Indian Nation (OIN)'s theory that "sovereign dominion" had somehow been "unified" with title when the tribe purchased the land on the open market. *Id.* at 213-14; *see id.* at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). The OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id.* at 203, 220-21. "Sovereign dominion" and "authority" therefore remain vested with New York and its county and local governments. *Id.* at 213; 216-217; *see id.* at 202-203.

Sherrill's rejection of OIN's unilateral assertion of sovereignty in whole or in part arose in the context of local assessments of ad valorem real property taxes. The OIN had resisted paying the taxes on its real property dating back to 1999. OIN sued in federal court to block the counties' *in rem* proceedings,

which had been filed in state court under state law, to foreclose on tax liens, as well as related state court proceedings to evict the tribe from the property. *Sherrill* is properly read to hold that the OIN was not only obligated to pay the real property taxes imposed on its fee-owned parcels, but was also subject to the county's *in rem* tax foreclosure proceedings to collect the taxes that it lawfully owed on its real property.

In direct defiance of *Sherrill*, the CIN has declared that it possesses sovereign authority over the fee lands it "reacquired" through open-market purchased from current titleholders. It has unilaterally declared the land "Indian Country" and opened a gaming parlor on it, and in furtherance of that gambling enterprise, refused to pay real property taxes, refused to abide by zoning and land use ordinances, and refused to comply with a Village ordinance prohibiting gaming.

The CIN has acknowledged the legal rule of *Sherrill* but avoids it in practice by raising tribal immunity from suit as a defense to any and all local government enforcement actions including with respect to payment of real property taxes. *See Cayuga Indian Nation of N.Y. v. Seneca County*, 890 F. Supp. 2d 240, 241 (W.D.N.Y. 2012) ("Plaintiff contends that it is entitled to injunctive relief because the foreclosure actions are barred by sovereign immunity. Specifically, Plaintiff contends that '[a]s a federally-recognized Indian nation, [it]

possess[es] tribal sovereign immunity [from suit], which bars administrative and judicial proceedings against the [Indian] Nation,' even if the taxes are properly owed.").

By its past and ongoing actions in the Village (and similar actions throughout its historic reservation area in Cayuga and Seneca Counties) the Nation has eviscerated *Sherrill*, turning it into an "elaborate academic parlor game" where the "authority to tax [real] property is meaningless." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008).[7]

The same impairment of Village governing authority occurs when enforcing zoning and land use regulations. The Nation has raised tribal immunity from suit to block enforcement of zoning and land use regulations. A recurring issue is the CIN's violation of a Village ordinance requiring a flashing traffic sign by its gaming establishment. This is an important highway

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[7] The quote from *Village of Hobart* reads more fully as follows:

> Land is either exempt from state law, or it is not. . . . Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless, and the Court's analysis in *Yakima*, *Cass County*, and *Sherrill* amounts to nothing more than an elaborate academic parlor game.

542 F. Supp. 2d at 921.

safety rule that the CIN has refused to abide by, and as to which the tribe has stated its intention to assert tribal immunity from suit should the Village try to enforce it.

The CIN's wrongful and aggressive assertion of sovereignty over its fee lands creates jurisdictional conflicts and confusion beyond that described above. Local law enforcement officers have delayed responding, or not responded at all, to emergencies reported at the CIN's property because the Nation claims absolute sovereign authority over the lands. The CIN's jurisdictional claims also make it difficult for local fire services to plan responses to emergencies on those lands.

In addition, the jurisdictional cloud created by the CIN has immobilized the Village from acting to condemn a small tract of tribally-owned property (to convert a private street into a public thoroughfare) for fear of further lawsuits by the Nation.

The CIN's illegal assertion of tribal sovereignty within the Village has been facilitated by federal court decisions that embrace the CIN's tribal immunity from suit without reference to (1) the immovable-property exception to sovereign immunity from suit applicable to States and foreign states, and (2) the facts and holdings in *Sherrill* and *Yakima* which upheld the right of local governments to bring *in rem* tax foreclosure actions concerning tribally-owned property for

nonpayment of taxes. *See Cayuga Indian Nation*, 890 F. Supp. 2d at 242 ("Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties . . ."). The Second Circuit in 2014 affirmed the district court's ruling that makes tribes effectively super-sovereigns. *Cayuga Indian Nation of N.Y. v. Seneca County*, 761 F.3d 218, 219 (2d Cir. 2014) (per curiam).

The CIN's actions in the Northern District of New York illustrate the highly disruptive, practical problems that arise when a tribe asserts sovereignty over real property that is unmistakably within the taxing and regulatory authority of a local government (*see Sherrill*, 544 U.S. at 219, 221) and the local government's legal right to enforce its laws is eviscerated by assertions of tribal immunity from suit. This right-without-a-remedy outcome "defies common sense," as the Second Circuit observed in *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. 2010). In its 2010 decision, the Second Circuit expressed frustration with Supreme Court precedent in this area, which it felt compelled a finding that the OIN was free to assert tribal sovereign immunity from suit to block *in rem* tax foreclosure proceedings by Madison County and Oneida County:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.

Id. at 163 (Cabranes and Hall concurring); *see id.* at 164 ("This result, however, is so anomalous that it calls out for the Supreme Court to reconsider *Kiowa* and *Potawatomi*. . . . If law and logic are to be reunited in this area of the law, it will have to be done by our highest Court, or by Congress.").[8]

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[8] The Second Circuit's "majority" decision by Judge Sack also noted the nonsensical nature of its holding:

> The Counties argue that the notion that they may tax but not foreclose is inconsistent and contradictory. To be sure, the result is reminiscent of words of the nursery rhyme:
>
> > Mother, may I go out to swim?
> >
> > Yes, my darling daughter; Hang your clothes on a hickory limb, And don't go near the water.
>
> Or, as the Counties more soberly assert, such a rule "eviscerates" *Sherrill*, "making that essential right of government [to tax properties] meaningless."

Oneida Indian Nation, 605 F.3d at 159 (citations omitted).

This Court understood the need for "law and logic to be reunited in this area of the law" and granted the Counties' petition for certiorari in Case No. 10-72.

The OIN feared the Court would do exactly that and reunite law and logic by applying the foundational principle that sovereign immunity does not preclude a court from exercising jurisdiction over immovable property located in another sovereign's dominion. This point was made by the amicus brief submitted by the Town of Lennox. This traditional principle of sovereign immunity law completely disposes of the purported right-without-a-remedy "anomaly." It does so by requiring the OIN and every other tribe that purchases land in open-market transactions from current titleholders to "lay down the prince" so that it cannot raise tribal immunity from suit to block the territorial sovereign's right to bring an *in rem* tax foreclosure proceeding if the tribe refuses to pay lawful property taxes. *See* Points III.A and B, *infra*, at 17-25; Respondents' Br. at 13-17, 31.

With that writing on the wall, the OIN abandoned its decades-long resistance to pay real property taxes——first asserted in 1999—and strategically enacted a tribal ordinance promising to pay past due amounts and future taxes on fee-owned parcels located in the two counties, in perpetuity. The Counties learned of the new tribal ordinance when counsel for the OIN sent a letter to this Court advising of

the development. The Counties' merits brief was at the printers. Based on the OIN's letter, this Court vacated the Second Circuit's decision and remanded for further proceedings. The OIN's successful tactic to avoid a decision on the merits by this Court left unanswered whether the immovable-property rule is the answer to the Second Circuit's nonsense nursery rhyme and prevents the "anomalous" result that "defies common sense."

The Second Circuit's per curiam decision in 2014 was free of nursery rhymes and other expressions of frustration. It simply found the Cayuga Nation immune from *in rem* tax foreclosures proceedings brought by Cayuga County, relying on this Court's tribal immunity cases (*Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998) and *Michigan v. Bay Mills*, 134 S. Ct. 2024 (2014)) and this Court's old maritime decision in *The Siren*, 74 U.S. 152 (1868), but never discussing the immovable-property rule that limits every other sovereigns' immunity. The circuit court cited *The Siren* for the proposition that there is no difference between *in rem* and *in personam* jurisdiction when it comes to immunity from suit. But as explained below, in Point III.D *infra* at 34-38, *The Siren* is inapposite and not even minimally instructive because it does not address what claims are permitted when one sovereign enters the territory of another and purchases land—a

circumstance specifically governed by the immovable property exception to immunity.

In light of these district and circuit court decisions in 2010 and 2014, and further actions taken by the CIN in central New York, the Village, Town and County have a direct interest in this case. Any failure by this Court to recognize ordinary *in rem* power of a state court to foreclose on real property taxes will strengthen the Nation's grip over fee lands that are, as a matter of law, within the taxing and regulatory authority of New York and its political subdivisions according to *Sherrill*.

II. SUMMARY OF ARGUMENT

As explained by Respondents (Br. at 13-25), sovereign immunity does not bar actions relating to immovable property held by one sovereign in the territory of another sovereign. The immovable-property rule that limits sovereign immunity from suit is rooted in principles of absolute territorial sovereignty that extend back centuries and inform not only the laws of the United States—as articulated by this Court—but guide the development of international law as well. In short, when a sovereign purchases real property located within the territory of another sovereign, that land is held subject to the laws of the latter and to all the incidents of private ownership. The interloping sovereign (whether a sovereign State, a sovereign Nation, or a "quasi-sovereign" Indian tribe) is required to

"lay down the prince"—that is, waive its sovereign powers with respect to real property located within the jurisdiction of the territorial sovereign. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

This traditional rule of immunity places the interloper-sovereign on a footing similar to a private citizen or corporation that buys land on the open market. It holds title just like any other landowner, and is subject to the taxing and regulatory authority of the territorial sovereign with respect to those lands, just like any other landowner. This includes being subject to *in rem* actions to collect real property taxes through tax foreclosure proceedings and *in rem* actions to condemn property.

In this case the interloping sovereign is the Petitioner Upper Skagit Indian Tribe. Petitioner has a reservation in the State of Washington. Those lands and others that the Tribe previously acquired are held in trust by the federal government and provide a land base for the Tribe. *See* 46 Fed. Reg. 46681 (Sept. 21, 1981) (proclaiming Upper Skagit Indian Reservation).

When the Tribe purchased the subject lands in 2013, it did so on the open market, acquiring title from the non-Indian titleholders who had owned the land for many

decades. The property purchased by the Tribe is without question real property that is located within the taxing and regulatory jurisdiction of the State of Washington as the territorial sovereign. While the lands in question may one day become the subject of a land-into-trust application by the Tribe, they are currently, and have been for the last century or so, held in fee–and until 2013 in non-Indian ownership and possession. The Tribe has no governmental authority over these fee lands as a matter of law, *Sherrill*, 544 U.S. at 219, 221, and fact.

In this context, the territorial sovereign (State) retains its inherent sovereign authority to adjudicate disputes over title and ownership of real property located within its borders, including through the adjudication of *in rem* adverse possession and quiet title actions.

State and local governments also are empowered to collect taxes through *in rem* tax foreclosure proceedings and to acquire land for public use through eminent domain powers through *in rem* condemnation proceedings, without regard to identity of the titleholder of the real property located within their domain. It does not matter if the entity holding title to that land is the State of Oregon, the Kingdom of Spain, or the Upper Skagit Indian Tribe. All sovereigns hold the land subject to the laws of the territorial sovereign.

To hold otherwise would improperly anoint the Upper Skagit Indian Tribe—and the other 568 recognized Indian tribes in the United States—"super-sovereigns" that enjoy greater immunity from suit than States or foreign states. Tribes are not entitled to "super-sovereign authority". *Okla Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). Such elevated status for Indian tribes cannot be reconciled with the common law requirement that tribal immunity from suit be analyzed under traditional immunity principals applicable to States and foreign states. Even the Upper Skagit Indian Tribe says its sovereign immunity is akin to that possessed by States and exists on the same "plane as independent states." (Resp. Br. at 15). But "super-sovereign" status does not exist for any State or foreign state as the United States is forced to concede (see U.S. Br. at 25), and if recognized here would exist on a much higher plane than either. That outcome cannot be reconciled with the heavily qualified nature of tribal sovereignty. *See* Point D, *infra*, at 38-39.

The decision of the Washington State Supreme Court should be affirmed as it is consistent with this Court's precedents in the area of tribal immunity from *in rem* tax foreclosures (*Sherrill* and *Yakima*) and the long-standing, traditional immovable-property exception to sovereign immunity. It means the Upper Skagit Indian Tribe holds the fee lands

just like a private landowner, subject to the law of Washington State, and cannot assert tribal sovereign immunity from suit with respect to any *in rem* proceedings taken with respect to that real property.

III. ARGUMENT

A. Petitioner's Argument is Contrary to Well-Established Limits on Sovereign Immunity Defenses to *In Rem* Proceedings.

Under "primeval" principles, a foreign country cannot purchase property in a state, put it to commercial use, refuse to pay property taxes or comply with zoning or "local regulatory controls," and then defeat state *in rem* enforcement actions against the property by invoking sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984). That rule should control the immunity claimed here.

This Court repeatedly has looked to the nature of, and limits on, foreign sovereign immunity as "instructive" for tribal sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Most recently, this Court has declined to "extend[ ] [tribal sovereign immunity] beyond what common-law sovereign immunity principle would recognize." *Lewis v. Clarke*,

137 S. Ct. 1285, 1292 (2017). One long-standing principles of sovereign immunity concerns immovable real property. That limitation is found in the federal common law of foreign sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 et seq. As a general matter, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd sub nom. Permanent Mission of India of the U.N. v. City of New York*, 551 U.S. 193 (2007).

This Court first embraced this rule concerning immovable property nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self-evident":

> A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically

> expressed in an early treatise: "A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil."

Asociacion de Reclamantes, 735 F.2d at 1521 (quoting 1 F. Wharton, Conflict of Laws § 278, at 636 (3d ed. 1905)). The alternative concern is that the foreign nation's courts are ill-suited to deciding *in rem* property interests or rights to possession in land outside their jurisdiction. *Id.* at 1521-22.

The Treatises also recognize the rule "[u]nder international law, [that] a [foreign] state is not immune from the jurisdiction of the courts of another state with respect to claims . . . to immovable property in the state of the forum." Restatement (Third) of Foreign Relations Law § 455(1)(c) (1987). This established view of the inherent limits of sovereign immunity also protects the enforcement of judgments concerning such real property. "Immovable property" owned by foreign states is "subject to execution" if "the judgment relates to that property" and the property is "used for commercial activity" rather than "a diplomatic or consular mission

or for the residence of the chief of such mission." *Id.* at § 460(2)(e).[9]

Congress has also validated this same view of foreign nation sovereign immunity. It did so when it codified the "immovable property" exception in FSIA. That Act provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case—in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Moreover, any such property "used for a commercial activity" is subject to execution if "the execution relates to a judgment establishing rights in [the] property" and the property "is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* at § 1610(a)(4)(B). These provisions were intended to codify, not alter, "the pre-existing real property exception to

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[9] See also Restatement (Second) of Foreign Relations Law § 68(b) (1965) ("The immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction."); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984-85 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between immunity theories, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)").

sovereign immunity recognized by international practice." *Asociacion de Reclamantes*, 735 F.2d at 1521; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. at 199-200; H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.

The Washington Supreme Court's rule is squarely consistent with the international rule. It prevents one entity's sovereign immunity from becoming a weapon to harm another sovereign. This rule fits perfectly to the situation where a tribal enterprise chooses to acquire real property in fee subject to the laws of the sovereign States. That rule, in turn, protects the interests of the *amici* from a sovereign immunity that would eviscerate their power to tax and regulate.

B. The Petitioner's Expansive View of Tribal Sovereign Immunity Exceeds State Sovereign Immunity.

Amici local governments ask this Court to apply to Petitioner the same rule that would apply to any State. Just as the *amici*'s courts would have *in rem* jurisdiction over real property owned by another state, it should have that same *in rem* jurisdiction over real property owned by a tribal government.

In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), Georgia purchased eleven acres in Tennessee for use as a railroad yard. Later,

Georgia brought an original action claiming the City could not condemn the property because of Georgia's sovereign immunity. This Court unanimously rejected that claim:

> The power of Tennessee, or of Chattanooga as its grantee, to take land for a street is not impaired by the fact that a sister State owns the land .... Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. ... The sovereignty of Georgia was not extended into Tennessee. ... [Georgia] cannot claim sovereign privilege or immunity. ... [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owners.

Id. at 479-82 (citations and paragraph breaks omitted).

The rule of *Georgia v. Chattanooga* has been invoked in *in rem* enforcement contexts long before Washington State decided its cases applying *in rem* jurisdiction to real property owned by a tribal government. The Minnesota Supreme Court explained that "a state acquiring ownership of property in another state does not thereby project its sovereignty

into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) (re proceedings to enforce property taxes on portion of bridge owned by Wisconsin city but located in Minnesota). The Illinois Supreme Court recognized that "[i]f it were otherwise, the acquisition of land in [one State] by another State would effect a separate island of sovereignty within [the home State's] boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625, 630 (Ill. 1957) (re court-imposed receivership over portion of bridge owned by Missouri county but located in Illinois).

If States cannot create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.*, neither should tribes have that power engrafted onto tribal immunity. See *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685, 688, 691, 694 (N.D. 2002) (relying on *Georgia v. Chattanooga* in holding that tribal sovereign immunity does not bar a "purely *in rem* action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government"; such land "is essentially private land," "the State may exercise territorial

jurisdiction" over it, "and the Tribe's sovereign immunity is not implicated").

The Amicus United States recognizes these principles (Br. 25-30) but asks the Court to brush them aside as if not raised by the question presented. That argument ignores the fact that the rule applied by the Washington Supreme Court and now on review reflects these fundamental principles limiting sovereign immunity. Indeed, this Court framed *Georgia v. Chattanooga* as an example of when "sovereign privilege or immunity" from suit would not prevent the application of a state's law to real property. 264 U.S. at 480-81. The immovable property rule is necessary to resolving this case and ignoring the rule will only harm *amici* and similarly situated public entities across the country.

In short, Petitioner's view of sovereign immunity as a defense that avoids *in rem* jurisdiction cannot be reconciled with long-standing limits on core principles of sovereign immunity. The better view is that provided by Respondents. Only that view will ensure that sovereign states cannot impose upon each other the very harms that Petitioner's arguments seek to impose upon Respondents, and which Petitioner would undoubtedly impose upon state and local governments if they choose not to pay property taxes. Most importantly, only the Respondents' rule protects the *amici*'s critical interests in

effective real property taxation and *in rem* jurisdiction over real property.

C. The Washington Supreme Court's Decision is Harmonious with this Court's Tribal Sovereign Immunity Cases.

This Court's decisions in *Kiowa*, *Potawatomi*, and *Michigan v. Bay Mills*, 134 S. Ct. 2024 (2014), affirmed earlier decisions of the Court that extended the immunity from suit possessed by sovereigns—like foreign nations and states—to Indian tribes in light of their recognized powers of self-governance. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But nothing in these decisions suggests that the immunity of tribes is greater than that enjoyed by foreign or State sovereigns. Nor do these decisions stand as an obstacle to affirming the Washington Supreme Court.

First, none of these cases involved *in rem* enforcement actions against tribally-owned real property, and thus none speaks to the circumstances of immovable-property located within another sovereign's domain. That situation is directly addressed by the longs-standing rule that limits sovereign immunity from suit with respect to such immovable property. None of the cases can be read to overrule that traditional restriction on immunity from suit.

To the contrary, *Bay Mills* endorsed the central notion that a State should retain "the ability to enforce its laws on its own lands." *Bay Mills*, 134 S.Ct at 2035, and the recently acquired tribal fee lands in that case were subject to state and local real property taxes. See *Bay Mills Indian Cmty. v. State of Michigan*, 626 N.W.2d 169, 174 (Mich. Ct. App. 2001). *Kiowa* dealt with a tribe's immunity from private contract claims, a matter of immunity from personal jurisdiction. See *C & L Enters.*, 532 U.S. at 418-23. *Potawatomi* barred claims for money damages against tribal treasuries, another matter of personal jurisdiction, while emphasizing numerous "adequate alternatives" to damage claims. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 514 . Indeed, this Court's grant of certiorari in *Oneida*, and the avoidance of that review as discussed above at 9-12, confirms that the issue in this case is not foreclosed by any prior decision.

Meanwhile, the Court's decisions in *Sherrill* and *Yakima* upheld the exercise of State *in rem* power regarding forced tax sales of tribal property over the tribe's assertion of tribal immunity from suit.

1. *Sherrill* and *Yakima* Permit the *In Rem* Tax Foreclosure of Taxable Tribal Real Property — Over Tribal Assertions of Immunity from Suit.

Sherrill and *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), both support applying the immovable property rule in the tribal immunity context so as to prevent a tribe from asserting immunity from suit with respect to real property it purchases within the absolute and complete jurisdiction of another territorial sovereign (New York State and Washington State). Both decisions unmistakably upheld the county's right to impose real property taxes on tribally-owned real property *and* to enforce that right through *in rem* tax foreclosure actions—over any and all defenses asserted by the tribe, including tribal immunity from suit that both tribes raised to resist tax enforcement proceedings.

In *Sherrill*, the OIN asserted tribal immunity from suit in state court *in rem* tax foreclosure proceedings. Specifically, the OIN's Answer to the City of Sherrill's Complaint seeking foreclosure and eviction of tribally-owned properties sets forth, as a "Second Defense," that:

> The Nation is a federally recognized Indian tribe, and its sovereign immunity bars defendant's efforts to tax

> and to take the Nation's lands, bars this suit, and precludes the exercise of jurisdiction over the Nation and the award of any relief requested by defendant. 63 Fed. Reg. 71941 (Dec. 30, 1998).

See Sherrill, Joint Appendix at 58.[10] The decision of this Court in *Sherrill* further addressed the OIN's sovereign immunity from suit when it stated that the tribe's sovereign status would not even prevent its eviction from the premises once title was acquired by the city. *Id.* at 214, n.7.

In *Yakima*, the tribe specifically argued it retained its "sovereign immunity from suit," citing this Court's decision in *Potawatomi*, which had just been handed down. Resp. Br., 1991 WL 521292 at *35.[11]

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[10] Under New York law, the unpaid property taxes are liens upon the OIN's parcels, and the proceedings to foreclose the tax liens are proceedings *in rem*. *See* N.Y. Real Prop. Tax Law §§ 902, 1120 (McKinney 2000). Consequently, tax foreclosure actions against the OIN, CIN, and other tribes that purchase land on the open market and fail to pay taxes are subject to the same *in rem* remedies, including foreclosure, as were the taxable tribal parcels in *Yakima*.

[11] The Yakima Tribe further noted that it had brought the lawsuit "to invalidate the County's imposition and collection of real estate taxes on fee lands of the Tribe and of tribal members." *See* Yakima Tribe Respondent's Brief at 9 (Resp. Br., 1991 WL 521292 at *9); *see also* Jt. App., Nos. 90-408, 90-577, at

Yakima nonetheless held that the tribe's taxable land was subject to "forced sale for taxes." *Yakima*, 502 U.S. at 264. In doing so, the Court observed that unlike *in personam* jurisdiction, the "mere power to assess and collect a tax on certain real estate" is not significantly disruptive of tribal self-government. *Id.* at 265; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007) ("[a]s a threshold matter, property ownership is not an inherently sovereign function"). In permitting the county's forced tax sale of tribal property, the Court in *Yakima* necessarily articulated and applied to the *in rem* tax collection proceedings a different legal standard from that applied in *Potawatomi*, which addressed immunity from suit with respect to *in personam* actions against the tribe. Indeed, the Petitioner has not shown that paying taxes or defending title is a significant disruption to

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5 (Complaint ¶ XI ["The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest"]); Pet Br., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, Nos. 90-408, 90-577, 1991 WL 521727, at *5 (U.S. Aug. 21, 1991) (county commenced foreclosure proceeding in state court against "several properties owned in fee by the Yakima Tribe or individual Yakima members"). By making these points, the Yakima Tribe necessarily acknowledged that tribally-owned properties were subject to the forced tax sale.

tribal self-government. Nor can it be so, given that it is not a significant disruption to the sovereignty of States or nations, as shown above.

Thus, under *Yakima*, tribal sovereign immunity from suit does not preclude a State from exercising *in rem* jurisdiction to adjudicate an adverse possession claim / quiet title action, or to collect real property taxes through foreclosure proceedings.

The record in *Sherrill* is even stronger. The Court in *Sherrill* upheld the taxing authority's right not only to bring *in rem* foreclosure actions to collect the unpaid taxes but also to bring related eviction proceedings to oust the tribe from the property after the city acquired title through foreclosure. The holding in *Sherrill* was utterly unnecessary if all the OIN needed to do in that case was decline to pay taxes and then invoke sovereign immunity to *in rem* foreclosure.

Under *Sherrill* and *Yakima*, then, a tribe owns real property just as any private landowner, holding it subject to the laws of the territorial sovereign. This is consistent with the immovable-property rule limiting immunity from suit when an inter-loping foreign or State sovereign holds real property in another State, subject to the laws of that territorial sovereign.

Petitioner and its *amici* nonetheless argue that *Yakima* is inapposite and does not support the right of local governments to subject tribally-owned fee lands to a forced tax sale for nonpayment of taxes. The brief of the United States spends the most time trying to distinguish *Yakima*, including suggesting this Court drew only an academic distinction between *in rem* jurisdiction and *in personam* jurisdiction. Br. at 18-20. The United States' brief goes even further in contending that "the Court had no occasion to address tribal sovereign immunity from suit because the Tribe itself had commenced that suit in federal district court to obtain declaratory and injunctive relief regarding its tax liability." Br. at 20. It is not clear what point the Unites States is trying to make, but it is not consistent with recognized principles of sovereign immunity.

A tribe can bring a declaratory judgement action in federal court to seek a declaration that its immunity from suit bars a forced tax sale (or other enforcement action) without waiving its immunity from suit as to that enforcement proceeding. *See Cayuga Indian Nation of N.Y. v. Seneca County*, 890 F. Supp. 2d at 242. Indeed, it would be a meaningless sovereign right to require the sovereign to waive its immunity from suit to establish immunity from suit. And, of course, that is not what the CIN did in *Cayuga*, what the Yakima Tribe did in *Yakima*, or what the OIN

did in *Sherrill*. These tribes each brought an action in federal district court for declaratory and injunctive relief in which the tribe asked the district court to declare it immune from—and permanently enjoin—tax enforcement proceedings pending in state court that sought to force a tax sale. And in both *Sherrill* and *Yakima* this Court held the local government taxing authority had the right not only to impose the real property taxes on tribally-owned property but also to collect those taxes—uniting law and logic and avoiding the right-without-a-remedy result that defies common sense.

As a further example, *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe* instructs that States may take off-reservation *in rem* action against tribally-owned property, emphasizing that States may "of course" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. 498 U.S. 505, 514 (1991). That ruling reinforces the holding in *Washington v. Confederated Tribes of the Colville Indian Reservation*, which upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. 134, 161-62 (1980). *Colville* explained that, "[b]y seizing cigarettes en route to the reservation, the

State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id.* at 162.

Yakima, *Potawatomi*, and *Colville* thus recognize that state and local governments may take *in rem* action against tribally owned movable property that violates applicable state or federal substantive laws. ***38***

Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 894-95 (6th Cir. 2007) ("[T]he Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question [in *Potawatomi* and *Colville*]. ... [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies.") (citations omitted). *In re 1650 Cases of Seized Liquor*, 721 A.2d 100 (Vt. 1998).

If tribally-owned movable property is not immune from *in rem* actions outside a reservation boundary, where federal supremacy preempts the substantive state laws, then surely tribally-owned immovable property should not be immune from *in rem* jurisdiction. That is particularly true given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See supra*, Argument III.A.

Depriving local governments of their enforcement authority would inevitably result in the disruptive practical consequences, including jurisdictional "checkerboard[ing]," that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n.13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see New York v Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impacts that the Court clearly stated they have the equitable right to prevent) (reversed on other grounds [Second Circuit]).

2. Petitioner and Its *Amici* Misunderstand and Misapply This Court's Old Maritime Case, *The Siren*.

The Siren, 74 U.S. 152 (1868), addressed Civil War maritime activities, starting with the federal government's seizure of a blockade-running steamer outside Charleston, South Carolina, the federal government's conscription of that steamer into U.S. naval service, and the unfortunate collision of that steamer with a private sloop that sunk as a result. *Id.* at 162-164.

The case addresses the particular and peculiar question of what compensation was available to the owner of the sunken sloop. The owner sued the federal government in federal court. Because the United States had not waived its sovereign immunity from suit in its own courts, this Court concluded that the United States was immune with respect to claims for monetary damages directly against it as well as "seizure" of the offending U.S. ship against which a judgment could be satisfied (a form of *in rem* jurisdiction). *Id.* at 154-55. *The Siren* stated in that specific context that "there is no distinction between suits against the government directly, and suits against its property.") *Id.* at 154.

The facts, reasoning, and holding of *The Siren* are limited to cases where the United States is the sovereign and pertains only to the scope of the United States' waiver of its own immunity within its own courts. In that particular setting, *The Siren* did not draw a distinction between *in rem* and *in personam* jurisdiction.

Sherrill and *Yakima*—not *The Siren*—provide the controlling legal standards and expressly treat *in rem* tax collection proceedings against tribally-owned property differently from *in personam* actions against the tribe itself. In both cases the tribe could not block a forced tax sale of real property owned by the tribe, demonstrating *in rem* jurisdiction is different from *in personam*

jurisdiction blocked in *Potawatomi*, *Kiowa* and *Bay Mills*. An *in rem* tax foreclosure for nonpayment of real property taxes does not implicate tribal governance in the same way that a direct action against the tribe does. *Yakima*, 502 U.S. at 265.

The Siren says nothing about what rule of law to apply when one sovereign enters the territory of another sovereign, purchases real property there, and then wrongly refuses to pay taxes that are lawfully imposed. Beyond the rulings in *Sherrill* and *Yakima* that conclusively demonstrate the territorial sovereign's authority to collect real property taxes through forced tax sales, the law of sovereign immunity provides the underlying principles that logically explain those holdings. When a State—or foreign country, or Indian tribe—purchases land outside its domain and located in the territorial jurisdiction of another State, the immovable-property rule dictates the outcome: The interloper-sovereign must "lay down the prince" and submit to the territorial sovereign's "absolute and complete jurisdiction," at least with respect to *in rem* proceedings directed at that real property.

Despite *The Siren*'s lack of relevance to the situation of dueling sovereigns, *amici* have been harmed because the Second Circuit in *Cayuga*, 761 F.3d at 221, relied on it to deny Seneca County the right to bring an *in rem* enforcement action to collect unpaid taxes. It

did so despite the holdings of *Sherrill*, 544 U.S. at 221, and *Yakima*, 502 U.S. at 265, permitting the counties to conduct a forced tax sale of tribal property, consistent with the immovable property exception.

The Siren's inapplicability to the case at bar did not stop Petitioner (Br. at 23) and each of its supporting *amici* (U.S. Br. at 12, 14; Brief of National Congress of American Indians et al., at 15-16; Brief of Cayuga Nation et al., at 9-10; Brief of The Fond du Lac Band of Lake Superior Chippewa Indians, et al., at 6, 17, 25) from quoting *The Siren*'s soundbite that *in rem* jurisdiction is no different than an action against the United States. They do so—as did the Second Circuit itself—without addressing that decision's unique facts, reasoning, and holding which is limited to the sovereign immunity of the United States.

Sherrill and *Yakima*, along with the immovable-property rule, provide the controlling legal standards by which to resolve the claims of competing sovereigns where one holds real property located in the other. These rules fully endorse the right of state and local governments, as the absolute territorial sovereign, to foreclose on real property for nonpayment of taxes even if the land in question is owned by another sovereign (State, foreign country, or Indian tribe). *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *Georgia v. Chattanooga*, 264 U.S. 472 (1924).

D. Elevating Tribes to Be "Super-Sovereigns" Cannot be Reconciled With Their Legal Status As Limited, Self-Governing Sovereigns.

Tribes are "quasi-sovereigns" or "domestic dependent" semi-sovereigns under the law. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Tribal self-governing power is "of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Tribes do not possess the full territorial sovereignty of States or foreign countries even on Indian reservations. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). And even as to internal tribal affairs, where tribes exercise their maximum sovereign authority over their members and their sovereign territory, tribal sovereignty is subject to total defeasance by Congress. *See Wheeler*, 435 U.S. at 323.

Thus, while tribes retain some immunity from lawsuits, tribes do not enjoy greater immunity from suit than foreign countries or the fifty States. In contrast to the limited "quasi-sovereignty" of tribes, States possess "a residuary and inviolable sovereignty" under the Constitution. *Alden v. Maine*, 527 U.S. 706, 715 (1999); *id.* at 713 ("The founding document specifically recognizes the States as sovereign entities") (internal quotations and

citations omitted). *Accord*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact").

Given the robust nature of State sovereignty under the Constitution, and the "limited character" of tribal self-governing power outside the Constitution, a lack of parity exists between State and tribal sovereignty. Tribes cannot logically or legally be deemed to possess a super-sovereign power to displace *in rem* jurisdiction of a state court over immovable real property.

E. Elevating Tribes to Super-Sovereigns Would Create the Disruptive Effects That *Sherrill* Sought to Foreclose.

Petitioner and the United States acknowledge that the law requires tribal immunity from suit to construed in reference to traditional immunity rules applicable to States and foreign countries, and concede, as they must, that no State or foreign country could do what they argue the tribe should be able to do, namely enter the territory of another sovereign, purchase real property subject to the territorial sovereign's laws, but not be required to "lay down the prince" and submit to *in rem* enforcement actions directed to that property. Petitioner's argument is a transparent result-oriented plea that asks this Court to carve out for it and other tribes, on no

principled basis whatsoever, an extraordinary exception from the traditional sovereign immunity rules that apply to the States and foreign countries.

This Court should decline that request. Strong policy reasons counsel against making tribes the uniquely empowered "super-sovereigns" that they ask to be made. Endowing tribes with much broader immunity than possessed by States or foreign nations would enable them to purchase land within a State, unilaterally declare it Indian Country under tribal control, and effectively achieve a transfer of jurisdiction by blocking the local government's enforcement actions through its assertion of immunity from suit—as is happening in the Village of Union Springs. That is precisely the disruptive jurisdictional "checker-boarding" harm that *Sherrill* sought to avoid and that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n.13 (observing that the OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impacts that the Court "clearly stated they have the equitable

right to prevent), *rev'd on other grounds*, 686 F.3d 133 (2d. Cir. 2012)).

Such unilateral and unlawful land grabs are prohibited and unnecessary because tribes can apply to the federal government to have lands taken into trust. *See Sherrill*, 544 at 220-221 (citing Indian Reorganization Act of 1934 now codified at 25 U.S.C. § 5108).

The divestiture of local government jurisdiction that is occurring piecemeal in the Village of Union Springs and elsewhere in central New York will be repeated across the country if Indian tribes are free to buy land anywhere, refuse to pay taxes, and—by asserting sovereign immunity from suit—face no consequences. By taking that aggressive approach, tribes create jurisdictional voids in which they can unilaterally declare tribal sovereign control over the land and effectively create Indian Country "islands" within States. That outcome not only defies the holding in *Sherrill* and common sense, but disrespects the sovereign status of States under the Constitution.

IV. CONCLUSION

No sovereign should have the type of sovereign immunity claimed by Petitioner against the *in rem* powers of the Washington courts. The judgment of the Washington Supreme Court should be affirmed.

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